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In the

Supreme Court of the United States

OCTOBER TERM, 1963

RAILROAD YARDMASTERS OF AMERICA, AFL-CIO,
Petitioner,

v.

ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	4
Reasons for Granting the Writ	10
Conclusion	21
Appendix A	1a
Appendix B	6a
Appendix C	41a

AUTHORITIES CITED

Cases:	Page
Aaxico Airlines, Inc. v. Air Line Pilots Association (No. 20931) —— F.2d —— [55 LRRM 2982, 49 CCH LC ¶18,886]	21, 22
Akron, Canton & Youngstown R. Co. v. Barnes, 215 F.2d 423 (C.A. 7, 1954)	17
Brady v. Trans-World Airlines, 223 F. Supp. 361 [54 LRRM 2480]	20
Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co., 372 U.S. 284, 9 L.ed.2d 759, 83 S.Ct. 691	12
Brotherhood of Locomotive Engineers v. Louisville & N.R. Co., —— U.S. ——, 10 L.ed.2d 172, 83 S.Ct. ——	17

Page

Cases—(Continued)

Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co., 305 F.2d 605 (C.A. 5, 1962) 20

Brotherhood of R. Trainmen v. Chicago River & I.R. Co., 353 U.S. 30, 1 L.ed. 2d 622, 77 S.Ct. 635 16, 17, 18

Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022 20

Brotherhood of Railroad Trainmen v. Smith, 251 F.2d 282 (C.A. 6, 1958) cert. den. 356 U.S. 937, 2 L.ed.2d 812, 78 S.Ct. 778 20

Burke v. Morphy, 109 F.2d 572 (C.A. 2, 1940) 17, 20

Butte, Anaconda & Pacific R. Co. v. Locomotive Firemen, 268 F.2d 54 (C.A. 9, 1959), cert. den. 361 U.S. 864 15, 17

Chicago & Western I.R. Co. v. Brotherhood of Ry. Clerks, 221 F. Supp. 561 [54 LRRM 2013] 20

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 89 L.ed. 1886, 65 S.Ct. 1282 (1945) 10, 15

Fiberboard Paper Products Corp. v. N.L.R.B., 322 F.2d 411 (C.A. D.C., 1963) enforcing 138 NLRB 550, cert. granted 375 U.S. 963 (Docket 610, October 1963 Term) 13

Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 223, 70 S.Ct. 14 20

Cases—(Continued) Page

International Powder Metallurgy Co., 134 N.L.R.B. 1601 13

Louisville & Nashville R. Co. v. Brown, 252 F.2d 149 (C.A. 5, 1958) cert. den. 356 U.S. 949, 2 L.ed.2d 843, 78 S.Ct. 913 20

Manning v. American Airlines, Inc., 329 F.2d 32 (C.A. 2, 1964) 11, 17, 20

M.K.T. R.R. Co. v. Locomotive Engineers, 266 F.2d 355 (C.A. 5, 1959), reversed in part, 363 U.S. 528, 4 L.ed.2d 1379, 80 S.Ct. 1326 18

NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (C.A. 2, 1952) 13

NLRB v. Katz, 369 U.S. 736, 8 L.ed.2d 230, 82 S.Ct. 1107 13

Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330, 4 L.ed.2d 774, 80 S.Ct. 761 14, 15, 20

Railroad Telegraphers v. Railway Express, 321 U.S. 342, 88 L.ed. 788, 64 S.Ct. 582 17, 20

Railroad Yardmasters v. Pennsylvania R. Co., 224 F.2d 226 (C.A. 3, 1955) 17

Railway Clerks v. Atlantic Coast Line R. Co., 201 F.2d 36 (C.A. 4, 1952), cert. den. 345 U.S. 992, 73 S.Ct. 1131 17

Railway Conductors v. Pitney, 326 U.S. 561, 90 L.ed. 318, 66 S.Ct. 322 11, 19, 20

Rolfes v. Dwellingham, 198 F.2d 591 (C.A. 8, 1952) 17, 20

Cases—(Continued) Page

Ruby v. American Airlines, Inc., 329 F.2d 11 (C.A. 2, 1964) 17

St. Louis, San Francisco and Texas Railway Co. v. Railroad Yardmasters of America, AFL-CIO, 328 F.2d 749 (C.A. 5, 1964), reversing 218 F.Supp. 193 1

Steele v. Louisville & N. R. R. Co., 323 U.S. 192, 65 S.Ct. 226 14, 20

Texas & N.O.R. Co. v. Railway Clerks, 281 U.S. 548, 50 S.Ct. 427 17

Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 65 S.Ct. 235 20

Virginia Railway Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.ed. 789 17

Statutes:

National Labor Relations Act (29 U.S.C. §151 et seq.) § 8(d) 14

Norris LaGuardia Act (29 U.S.C. §101 et seq.) § 13(c) 14

Railway Labor Act (44 Stat. L. 577, as amended; 45 U.S.C. § 151-163)

Section 2 14

Section 2, Seventh 6, 12

Section 6 2, 3, 11, 18

28 U.S.C. §1254 (1) 2

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ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on March 4, 1964.

Opinions Below

The memorandum opinion of the United States District Court for the Northern District of Texas is reported at 218 F. Supp. 193 [unofficially reported at 53 LRRM 2092 and at 47 CCH LC §18,207] and is printed in Appendix B attached hereto (pp. 6a-41a). The opinion of the Court of Appeals is reported at 328 F. 2d 749 [unofficially reported at 55 LRRM 2583 and at 49 CCH LC

¶ 18,789] and is printed in Appendix C attached hereto (pp. 41a-50a).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 4, 1964 [R. 311]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Railway Labor Act require a carrier to exhaust Section 6 notice and bargaining procedures before it may abolish the craft or class of yardmaster and transfer yardmaster duties to other employees outside the yardmaster bargaining unit?

2. Does a district court have jurisdiction under the Railway Labor Act to *construe* a collective bargaining agreement to *the extent necessary* to determine whether a proposed change is (1) a "major dispute" because it constitutes a change in "rates of pay, rules, or working conditions of . . . employees as a class" and is not governed by the terms of the agreement, or (2) a "minor dispute" because it raises only a grievance or dispute growing out of the "interpretation or application of agreements"?

3. May a district court's finding of fact, that a carrier intended to abolish the classification of yardmaster, be ignored or inferentially set aside by the Circuit Court when such finding is not

clearly erroneous and is supported by substantial evidence which the carrier did not contravert?

4. Does a district court have jurisdiction under the Railway Labor Act to enjoin a carrier from violating the *status quo* provision of Section 6?

Statute Involved

The statute involved and referred to herein is the Railway Labor Act (44 Stat. L. 577, as amended, 45 U.S.C. § 151-163), pertinent provisions of which are set out verbatim in Appendix A attached hereto (pp. 1a-6a).

Statement

The facts of this case are accurately described in the opinion of the district court, *infra*, pp. 6a-15a, 17a-20a, 33a-38a.

The case concerns the unilateral efforts of respondent, hereinafter called "carrier" or "railroad," to abolish the classification of yardmaster at its Fort Worth yards and, ultimately, throughout the entire Frisco system. The facts are not in dispute.

Petitioner, hereinafter called "union," was the certified representative of the craft or class of yardmasters employed by carrier [R. 250].

There was and is a collective bargaining agreement in effect between carrier and union, which agreement defined the term "yardmaster" as meaning "yardmasters of all grades except as other-

wise provided herein." [R. 27, p. 3, Rule 1(a)] "By custom and usage it is well understood, however, that the principal duties of yardmasters are to supervise the employees engaged in making up, breaking up and handling train and switching in railroad yards." [R. 28, p. 13] Also, according to undisputed evidence as to uniform past practice, although "the Carrier may abolish a yardmaster position' . . . if any work remains, the carrier may not then require others, outside of the Agreement and not excluded therefrom, to perform such work."[2] [R. 28, p. 13]

In the context of this relationship between the union and the railroad,

> "On or before October 8, 1962, the Railroad determined to abolish the classification of yardmaster at its Fort Worth yards, and to transfer the duties of said classification to other of its employees outside the bargaining unit represented by the Union." [p. 13a, *infra*]

Whereupon it gave written notice abolishing all of the yardmaster positions in Fort Worth.[3]

District Judge Brewster found that "The effect of the plan, if carried out, would have been to

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[1] Rule 16(e) provided: "This agreement shall not be construed as an obligation to maintain or establish yardmasters' positions, nor as restricting the Company's right to discontinue yardmaster positions now or hereafter established."

[2] The agreement itself provided that: "It is agreed classification of positions covered by this agreement, according to work assignment in effect on date of this agreement, is correct." [R. 27, p. 19, Rule 16(b)].

[3] The positions consisted of one general yardmaster, two yardmasters and one relief yardmaster.

eliminate completely the classification of yardmaster, and to transfer the duties of yardmaster classification to other employees of the Railroad outside the bargaining unit represented by the Union." [pp. 13-14, *infra*]

The elimination of the yardmaster classification was "not made necessary by lack of need for performance of duties heretofore assigned to them, or by anticipation of any reduction in volume of yard traffic. . . . Under the proposed change, the work would continue; but it would be done by clerks, engine foremen and other employees, with the help of IBM machines. The yardmaster duties would be new and increased responsibilities for those employees, and none of them belongs to the bargaining unit represented by the Union which brought this suit." [pp. 14a, *infra*]

In addition the trial court found that

> ". . . the Railroad regards the entire classification of yardmaster as being obsolete; that it has felt and now feels that abolition of the classification and absorption of its duties by other employees would eliminate waste; and that it plans to get rid of the classification by releasing the yardmasters terminal by terminal in its lines. It is further concluded that the plan was part of an over-all one applicable to the Frisco system." [p. 17a, *infra*]

All of the foregoing findings were supported by substantial evidence, and the carrier introduced no evidence to the contrary, nor did any witness deny

that the carrier intended to abolish the classification of yardmaster.

The trial court found that

> "The railroad has been and is attempting to effect the change here involved unilaterally, without giving notice to the Union under Section 6 of the Railway Labor Act, and without any intention or attempt to comply with any of the procedures provided by the Act for helping settle major disputes" [p. 18a, *infra*],

and that

> "... [i]f a permanent injunction is not granted, the Railroad will proceed unilaterally to carry out its plan, with the result that the Union will suffer irreparable injury for which it will have no adequate remedy at law." [p. 19a, *infra*]

District Judge Brewster thus held that "if the plan is carried out, the work heretofore done by the yardmasters and the volume of traffic will still be there, but the yardmasters will not. That unquestionably amounts to abolishing the classification of yardmaster, not merely to discharging individual employees. . . . The plan is one to make a change in the working conditions of the yardmasters, as a class, and is in the teeth of Sec. 2, Seventh, of the Railway Labor Act prohibiting a railroad from taking action to change the working conditions of its employees, as a class, as contemplated by the agreement, without giving a Section 6 notice and proceeding thereafter on the basis

provided for handling major disputes." [pp. 33a-34a, *infra*]

Rather than engage in a strike to protest carrier's unilateral action, the union filed this suit. The district court's opinion commented:

> "The Union in the present case was not required to sit idly by and wait for its yardmaster classification to be eliminated in one swoop over the entire Frisco system or over just the lines of the Texas subsidiary, when it could see that its classification was being effectively nibbled away in a series of actions in separate terminals.[4] [p. 34a, *infra*]

> "The Union had the right to seek full redress under the Railway Labor Act when it awoke to the real result that would inevitably follow from the total of a series of acts which could have appeared at first to be local in nature. When the Railroad sought to do away with the yardmaster classification in the terminal located in the center it had selected for its operations in Texas, it was time for the Union to realize that the Railroad was acting on the basis that the position of yardmaster was obsolete." [p. 35a, *infra*]

Rejecting the railroad's claim that the controversy was "only a minor dispute," Judge Brewster wrote:

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[4] The district court had found that "The proposed change in the Fort Worth terminal is not the only action of that type which has recently occurred in the Frisco system. Similar moves had been made in yards in Fort Smith, Arkansas; in Enid, Oklahoma; and in Cape Girardeau, Missouri . . . . [T]here were even additional ones in terminals not specifically identified. . . ." [p. 15a, *infra*]

"That claim does not fit the scope of the intended action, the effect of its results on the contract, or the possible consequences to the general public. It is an action that will change working conditions as they are contemplated by the agreement. If the plan continues, *it will terminate that agreement by destroying the subject matter thereof.* It is only reasonable that the Union will use every legal means to keep from losing the contract by planned erosion. That kind of issue does not meet the test of a minor dispute. . . . There is nothing in the grievance procedure set up by the agreement that was intended to or could cope with the problem here. The Adjustment Board does not have the facility or the power to handle it." (Emphasis added)

"The answer to the contention that this case involves only an interpretation of the existing agreement is that the Union's cause of action is based upon an alleged violation of its statutory right under the Railway Labor Act to bargain over a major dispute. The Railroad has tried to convert the suit into one calling for an interpretation of the contract by using its answer to inject that question into the case. The Act does not give a defendant, railroad or union, the power to change a major dispute into a minor one merely by claiming in its answer that some provision of the contract is applicable." [pp. 36a-37a, *infra*]

The trial court examined the contract, and determined that the dispute was not based on contract:

". . . the language quoted [Rule 16 (e)] does not

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[5] Neither the carrier nor the union has ever submitted this dispute to the National Railroad Adjustment Board.

purport to give the Railroad the power or authority to terminate the contract by eliminating the yardmaster classification entirely, whether done at one time or by a deliberate unilateral process of attrition." [p. 37a, *infra*]

The district court concluded that "The contest over obsolescence shown by the evidence . . . should not be cheapened by treating it as one which can be cured by patchwork or a minor tune-up. The solution . . . will require the use of 'every facility for bringing about an agreement' and the application of the 'pressures for mobilizing public opinion' . . . provided for working out major disputes." The parties were therefore directed to meet and negotiate under procedures provided for settling major disputes, "where both sides of the question will be presented and the public will have some assurance that any adjustment found to be necessary will be cushioned by tempering business efficiency with humaneness." [p. 40a, *infra*]

The Court of Appeals disagreed with the district court's analysis and solution. Noting the carrier's position "that rather than being off base by not proceeding under Section 6 seeking to bargain for a change in existing agreements, it was strictly in line by acting under the existing contract and that it was in fact the Union that was off base in going to court to litigate the issue . . .," the Court of Appeals held that "if there is no *intended change* in an existing contract or agreement there is no requirement under Section 6 that the bargaining procedures be followed." (Emphasis added) [pp. 44a, 45a-46a, *infra*]

The Circuit Court reversed, holding that the carrier's defense "based upon the language of Rule 16(e) raises a substantial issue as to the interpretation of the contract. . . ." The Court thus viewed the change as creating only a minor dispute. It stated: "We do not . . . attempt to construe the contract," and held that "[b]efore a tribunal can decide that the terminations at issue were not justified, it must construe the language of Rule 16 (e)." [p. 48a, *infra*]

> "It is plain that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit."

The Court noted that the trial court had "received evidence . . . to show that the abolition of the jobs in Fort Worth was but one step in a proposal to abolish all yardmaster jobs or 'classifications,'" [p. 44a, *infra*] but it did not address itself to the trial court's finding that the carrier proposed to abolish the yardmaster classification and transfer its duties to other employees outside the yardmaster bargaining unit.

Reasons for Granting the Writ

The judgment of the Circuit Court demonstrates a necessity for further clarification of the distinction between major and minor disputes described in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 89 L. ed. 1886, 65 S. Ct. 1282 (1945). Without such clarification, the statutory duty to bar-

gain provided by the Railway Labor Act is in jeopardy.

The Circuit Court applied a mechanistic formula to determine whether the instant dispute was major or minor. It used a deceptively simple test: does the dispute require a construction of the existing collective bargaining contract? Having found that it does, the court held that *"the trial court erred in entertaining jurisdiction of the suit."* (Emphasis added). The Court did not base its test on whether the dispute could or would be *determined* by the contract. Nor did it base its decision on the exercise of "equitable discretion," as this Court did in *Railway Conductors v. Pitney*, 326 U.S. 561, 567, 90 L. ed. 318, 66 S. Ct. 322. Instead, it announced a *jurisdictional rule* which, if followed, will render the federal courts substantially impotent in finding violations of the status quo provisions of the statute. At issue here is whether, in the real world of labor management relations, a unilateral change in rates of pay, rules or working conditions can be a refusal to bargain under the Railway Labor Act.

Petitioner believes that the impact of the *no jurisdiction* rule formulated by the Circuit Court will cause far more damage to collective bargaining under the Railway Labor Act than a comparable rule would cause under the National Labor Relations Act. This is so because "[t]he effect of § 6 [of the Railway Labor Act] is to prolong agreements subject to its provisions regardless of what they say as to termination." *Manning v. American Airlines, Inc.*, 329 F.2d 32, 34 (C.A. 2, 1964). Indeed,

this Court's opinion in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co.*, 372 U.S. 284, 9 L. ed.2d 759, 83 S.Ct. 691, and the eventual settlement of the subject dispute at White House bargaining conferences, may have little more than historical significance if a major dispute can be changed into a minor one either by a mere claim that some provision of the contract is applicable or by a superficial observation that the proposed change violates the contract.

The test of a minor dispute can hardly be based on the single question: does the proposed change in rates of pay, rules or working conditions, if effected without consent, violate the contract? All or most of such changes, regardless of their magnitude and regardless of the number of employees affected, violate the contract. But § 2, Seventh, teaches that the distinguishing feature of a major dispute is that the change be applicable to employees *as a class*. In most situations the parties themselves are in agreement when a proposed change raises a major dispute, and in such situations § 6 notices are served as a matter of course. But if the parties are unable to agree, surely a court should not abdicate its judicial function and allow the determination to be made unilaterally by the proponent of the change. If a carrier proposes a far-reaching change—such as abolishing a classification — but does not intend to write the change into the agreement, is the change any less a major one?

A unilateral change in terms and conditions of employment violates the duty to bargain imposed

by the National Labor Relations Act, *NLRB v. Katz*, 369 U.S. 736, 8 L. ed.2d 230, 82 S.Ct. 1107. There is no apparent reason for a less stringent rule under the Railway Labor Act.

Under the NLRA, an employer is required to bargain during the term of an existing agreement as to any mandatory subject not included in the negotiations on the agreement currently in effect, *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (C.A. 2, 1952). And an employer is guilty of a refusal to bargain when it attempts to modify or abolish a certified bargaining unit by transferring employees and equipment to a plant outside the bargaining unit without notification to or bargaining with the certified union. *International Powder Metallurgy Co.*, 134 N.L.R.B. 1601. By the same reasoning, the NLRB and the Second Circuit held that an employer violated the NLRA when it terminated the employment of an entire bargaining unit and contracted out all of the work formerly performed by bargaining unit employees, without bargaining with the union which represented those employees, *Fiberboard Paper Products Corp. v. N.L.R.B.*, 322 F.2d 411 (C.A.D.C., 1963), enforcing 138 NLRB 550, certiorari granted 375 U.S. 963 (Docket No. 610, October 1963 term).

Although both the employer in *Fiberboard* and the carrier herein expressed different legal reasons to justify the unilateral action which in each case was presumably "motivated solely by economic necesssity" (322 F.2d 411, 414), the issue of unilateral transfer of work from the bargaining unit and

whether there is a duty to bargain as to such transfer of work is common to both cases. In light of the pending review of the *Fiberboard* decision, the instant case affords an opportunity to round out the parallel duty to bargain under the Railway Labor Act. This is especially appropriate, for the bargaining requirements of both statutes have been referred to by this court as "like provisions," *Steele v. Louisville* & N.R. Co., 323 U.S. 192, 200, 65 S.Ct. 226; and in *Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330, 4 L. ed. 2d 774, 80 S.Ct. 761, this Court used the languange of § 13(c) of the Norris-LaGuardia Act [29 U.S.C. § 101 et seq.], defining a labor dispute as including "any controversy concerning terms or conditions of employment," to find that a dispute over abolishing jobs related to "working conditions," which is the phrase used in § 2 of the Railway Labor Act. The Court thus made no distinction between "terms and conditions of employment," also used in § 8(d) of the National Labor Relations Act [29 U.S.C. § 151 et seq.], and "working conditions" used in the Railway Labor Act.

The instant case therefore poses the problem of implementing the Court's interpretation of the duty to bargain defined in *Railroad Telegraphers', supra*. The Court there held that

> ". . . it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement." (362 U.S. 341)

In *Railroad Telegraphers'* the carrier had submitted the dispute to the National Railroad Adjustment Board,[6] whereas in the instant case the carrier made no such submission. Yet the Circuit Court herein held that abolishment of yardmaster jobs with accompanying transfer of work to other employees outside the bargaining unit was only a minor dispute, because the carrier did not intend to write the change into the agreement and it had a substantial claim under Rule 16(e) of the agreement.

But whether the carrier intended to write the change into the agreement or not, it was a major dispute because of its effect on the employees as a class, and because the existing agreement did not control the controversy, *Butte Anaconda & Pacific R. Co. v. Locomotive Firemen*, 268 F.2d 54 (C.A. 9, 1959), cert. den. 361 U.S. 864; *Elgin, Joilet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 89 L.ed. 1886, 65 S.Ct. 1282 (1945).

But did the carrier have a substantial claim under the agreement? Obviously, the Court of Appeals had to construe the agreement in order to state that

> ". . . a defense based upon the language of Rule 16(e) raises a substantial issue as to the interpretation of the contract. It is not a fictitious or merely colorable issue."

The only difference between the constructions by

[6] The carrier's ex parte submission is discussed in the district court's opinion unofficially published at 43 LRRM 2145.

the trial court and by the Circuit Court was that Judge Brewster considered the scope of the certification, the transfer of work to other employees outside the bargaining unit, evidence that the entire classification rather than only individual jobs was being abolished, the intent of the contract as a whole, and the uniform past practice, whereas the Circuit Court considered only the single provision and concluded therefrom that

> "Before a tribunal can decide that the terminations at issue were not justified, it must construe the language of Rule 16(e)."

Both courts thus construed the language, but Judge Brewster concluded, on grounds which were not challenged by the Circuit Court, that the dispute was not a contract dispute at all, but a major dispute. Thus, the issue was not one under which any tribunal (save a possible Presidential Emergency Board with power of recommendation only) would have authority to decide if the terminations were "justified." Justification would only be important as an argument in the collective bargaining process and as an appeal to public opinion.

The Circuit Court confused construing the contract with deciding the dispute under the contract. Petitioner has no quarrel with the proposition that grievances which depend only upon application or interpretation of the contract for their determination must be submitted to the appropriate adjustment board for decision, and such board has exclusive jurisdiction. *Brotherhood of R. Trainmen*

v. Chicago River & I.R. Co., 353 U.S. 30, 1 L. ed. 2d 622, 77 S.Ct. 635; *Locomotive Engineers v. Louisville & N.R. Co.*, U.S. , 10 L. ed. 2d 172, 83 S. Ct. . But the board does not have jurisdiction to find the equivalent of an unfair labor practice under the Railway Labor Act — that function has been vested exclusively in the courts. *Texas & N.O. R. Co. v. Railway Clerks*, 281 U.S. 548, 50 S.Ct. 427; *Virginia Railway Co. v. System Federation*, 300 U.S. 515, 57 S.Ct. 592, 81 L. ed. 789.[7]

This brings us full circle to the beginning of this discussion: *the question of jurisdiction.*

According to the Circuit Court's view, federal court jurisdiction to enforce the statutory duty to bargain exists only when the collective bargaining contract does not require construction. That view makes no distinction among the various purposes for which it may be necessary to construe the contract. In any event, the court must make a preliminary construction to determine whether the dispute is a dispute under the contract or not. If it is found to be such a dispute, it will be labeled "minor" and the court ought to refrain from deciding the case, for such a dispute is admittedly within the exclusive

[7] The following cases are examples of judicial enforcement of the duty to bargain under the Railway Labor Act: *Virginia Railway Co. v. System Federation, supra; Burke v. Morphy*, 109 F.2d, 572 (C.A. 2, 1940); *Roltes v. Dwellingham*, 198 F.2d 591 (C.A. 8, 1952); *Telegraphers v. Railway Express Co.*, 321 U.S. 342, 88 L.ed. 788, 64 S.Ct. 582; *Railroad Yardmasters v. Pennsylvania Railroad Co.*, 224 F.2d 226 (C.A. 3, 1955); *Railway Clerks v. Atlantic Coast Line R. Co.*, 201 F.2d 36 (C.A. 4, 1952), cert. den, 345 U.S. 992, 73 S.Ct. 1131; *Akron, Canton & Youngstown R. Co. v. Barnes*, 215 F.2d 423 (C.A. 7, 1954); *Butte, Anaconda & P.R. Co. v. Locomotive Firemen*, 268 F.2d 54, (CA 9, 1959, cert. den. 361 U.S. 864; *Ruby v. American Airlines, Inc.*, 329 F.2d 11 (C.A. 2, 1964); *Manning v. American Airlines, Inc.*, 329 F.2d 32 (C.A. 2, 1964).

jurisdiction of the adjustment board. But if the preliminary construction reveals a dispute which is not a grievance under the contract but is a major dispute which the adjustment board has no power to settle, then the court should exercise its function under the statute and enforce the duty to bargain and enjoin violation of the status quo pending completion of §6 procedures. This is exactly what Judge Brewster did. He did not construe the contract for the purpose of deciding the case under the contract. He examined the contract—construed it to the extent necessary—to determine that the contract did not apply. He did no more than a court normally does when it enjoins a union from striking over a minor dispute under the *Chicago River* doctrine. He did no more than did the Court in *Butte, Anaconda & P.R. Co. v. Locomotive Firemen*, 268 F.2d 54 (C.A. 9, 1959), cert. den. 361 U.S. 864, which rejected the carrier's argument that its plan for operating a new yard created a minor dispute. The Ninth Circuit there held that "No question was involved as to the interpretation of existing agreements." The contract is not a sacred cow which cannot be examined under any circumstances. If substance is to prevail over form, then the court must be empowered to answer the threshold question: does this dispute arise under the contract, or does it pertain to a change in working conditions of the employees as a class?

In *M.K.T R.R. Co. v. Locomotive Engineers*, 266 F. 2d 355 (C.A. 5, 1959), reversed in part, 363 U.S. 528, 4 L. ed. 2d 1379, 80 S.Ct. 1326, the Fifth Circuit dissolved an injunction maintaining the status quo

in a minor dispute because in its view "the district court could not pass any sort of preliminary judgment upon the merits of that dispute." (266 F. 2d 341). This Court granted certiorari on that point, holding that the examination of the contract was inherent in the granting of an injunction under the *Chicago River* doctrine and the district court was free to exercise the typical powers of a court of equity. Certainly the district court (in fact the very same district court) should have jurisdiction to examine the contract not for the purpose of deciding the dispute under the contract, but only to determine whether the contract governs the dispute, and if it determines that it does not, then it should be free to exercise the typical powers of a court of equity to enjoin imposition of conditions which change the status quo in a major dispute where the carrier has failed to exhaust the bargaining and mediation requirements of the Act.

The decision of the Fifth Circuit herein contradicts the language of this Court in *Railway Conductors v. Pitney*, 326 U.S. 561, 90 L. ed 318, 66 S.Ct. 322. The Circuit Court recognized no jurisdiction under which the district court could construe the contract, regardless of whether the dispute ultimately related to statutory duties or contractual duties. But this Court in *Pitney* did not write in terms of courts having "no responsibility" in contract disputes under the Railway Labor Act, but in terms of "minimum responsibility" (326 U.S. 566). The Court did not deny the district court's jurisdiction to act, but, under the circumstances of that case, where each party based its position on agree-

ments, held that "the court should exercise equitable discretion to give [the NRAB] the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then." (326 U.S. 567). That was a far cry from lack of jurisdiction. At p. 566 the Court added the caveat which presaged the instant case:

> "Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown a court of equity could, in a proper case, intervene."

The instant case is such a proper case, where the trial court has made undisturbed findings of fact that the carrier's plan was to abolish the yardmaster classification without bargaining with the union, finding that

> "If the plan continues, it will terminate the agreement by destroying the subject matter thereof."

But for the intervention of the district court below, four yardmasters in Fort Worth would have lost their yardmaster positions for all time, and a chain reaction, through the bumping procedure [R. 161], would have followed whereby they would have replaced other employees, in other bargaining units, who in turn might also have exercised contractual rights (under different agreements) to replace other employees. Eventually four employees outside the yardmaster classification would lose their jobs. This procedure would then have been repeated throughout the railroad's system. The NRAB would have had no power to stop this abolishment of jobs and transfer of duties to other bargaining units. The railroad would have achieved as a *fait accompli* elimination of a craft or class, and subsequent bargaining would be rendered moot.

Conclusion

If the opinion of the Circuit Court below is allowed to stand as a statement of the jurisdiction of a federal district court in major dispute cases, then the collective bargaining process under the Railway Labor Act will be seriously impaired. This adverse effect of the decision has already been felt, however, for on April 15, 1961, the Fifth Circuit rendered a decision in *Aaxico Airlines, Inc. v. Air Line Pilots Association* (No. 20931) ——— F.2d ——— [55 LRRM 2982, 49 CCH LC ¶18,886], on the authority of its opinion in the instant case, holding a district court had no authority to find that a collective bargaining contract was still in effect, when the carrier was admittedly denying coverage of the

contract and was proceeding to change wages and working conditions without treating with the certified representative of its employees. Motion for rehearing is pending therein. But should the present opinion in *Aaxico* stand, petitioner herein will respectfully request this Honorable Court to withhold decision in the instant case pending receipt of petition for certiorari in the *Aaxico* case because of errors of law which are common to both cases.

For the foregoing reasons, petitioner prays that writ of certiorari be granted herein, and upon review the decision of the Court of Appeal for the Fifth Circuit be reversed.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS

The relevant provisions of the Railway Labor Act (44 Stat. L. 577, as amended; 45 U.S.C. §§151-163) are as follows:

"TITLE I

"Section 1. When used in this Act and for the purposes of this Act —

* * *

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

"Third. The term 'Mediation Board' means the National Mediation Board created by this Act.

* * *

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * *

"Section 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . .

* * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * *

"Ninth. If any dispute shall arise among a car-

rier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary

by it to carry out the purposes and provisions of this paragraph.

* * *

"Section 3.

"First. There is established a Board, to be known as the 'National Railroad Adjustment Board,' . . . and it is hereby provided—

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the

Board upon request of either party shall interpret the award in the light of the dispute.

* * *

"Section 5.

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

* * *

"Section 6.

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of

this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

APPENDIX B

OPINION

OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RAILROAD YARDMASTERS OF AMERICA
vs. **CIVIL ACTION NO. 4695**
ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY

MEMORANDUM OPINION

This case involves another phase of what Mr. Justice Clark, in *Railroad Telegraphers v. Chicago & N. W. R. Co.*, 1960, 362 *U. S.* 330, 342, 80 *S. Ct.* 761, 4 L. Ed 2d 774, 784, referred to as the "financial headaches" of the railroads, which management and labor, collectively, claim is attributable in part to the failure of managerial, financial, operational and work standards to keep pace with the technological improvements in the industry. The controversy in the present case arose from actions of the railroad designed to eliminate what it considered an obsolete employee classification without first bargaining with the certified union.

The suit is by the Railroad Yardmasters of America, herein called "Union", against the St. Louis, San Francisco and Texas Railway Company, herein called "Railroad", for an injunction and a declaratory judgment. The relief prayed for is in substance:

(a) that the Railroad be enjoined from abolishing the classification of yardmaster at its Fort Worth yards and elsewhere, or from transferring the duties of such classifications to other of its employees outside the bargaining unit represented by the Union, unless and until the Railroad shall have complied with the requirements of the Railway Labor Act as to notice, collective bargaining, negotiation, mediation and other necessary procedures;

(b) that a judgment be granted declaring that any unilateral action of the Railroad in abolishing the yardmaster classification, or in transferring the duties of said classification to other of its employees outside the bargaining unit represented by the Union, will be in violation of the Railway Labor Act.

The Railroad urges the following defenses:

1. It has the right to discontinue yardmaster positions upon 48 hours advance notice under Rules 15 and 16 (e) of its collective bargaining agreement with the Union.

2. The Union and the particular yardmasters

involved have not complied with the grievance procedure set out in Rules 11 and 12 of the collective bargaining agreement.

3. The dispute involved is only one over the interpretation of an existing agreement, and is therefore a minor dispute exclusively within the jurisdiction of the National Railroad Adjustment Board established by Section 3 of the Railway Labor Act. 45 U. S. C. A., Sec. 153.

4. The Union and the particular yardmasters involved have an adequate remedy at law.

It is important to point out in the beginning that the Union has not put in litigation the question of whether the Railroad can abolish individual yardmaster *positions* without securing the consent of the Union. Its claim here is only that the Railroad cannot take unilateral action designed to eliminate the yardmaster *classification*, without having given notice under Section 6 of the Railway Labor Act and having exhausted the negotiation and mediation procedures under that Act.

The Court has jurisdiction of this case under 28 U. S. C. A., Sec. 1337. *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 7 Cir. 1962, 310 F. 2d 503 affirmed, 1963, 9 L. Ed. 2d 754; *Railroad Telegraphers v. Chicago & N. W. R. Co.*, supra.

Both parties hereto are subject to the provisions of the Railway Labor Act. 45 U. S. C. A., Sec. 151,

et seq. The fundamental question involved is whether the dispute is major or minor within the decisions construing the Act. If it is minor, the Union cannot maintain this action here, but must present its complaint to the National Railroad Adjustment Board. On the other hand, if the dispute is major, the Union is entitled to the relief prayed for in this case.

The Union is an unincorporated association organized for the purposes and objectives of a labor organization representing the class or craft of railroad employees which includes yardmasters. In May, 1945, the National Mediation Board certified that the Union was duly designated and authorized to represent the class or craft of yardmasters employed by the Railroad for the purposes within the purview of the Railway Labor Act.

The Railroad here is a unit in an affiliation of common carriers which make up what is known as the "Frisco System", sometimes referred to herein as the "Frisco". The St. Louis-San Francisco Railway Company is the parent company and the principal owner. The third one is the Alabama, Tennessee and Northern Railroad Company. The three companies are under common ownership by permission of the Interstate Commerce Commission to the extent that they can so operate under existing laws. They are related by management, and operate as a unit to the extent permitted by law. The Frisco system as a whole, and each of its constituent companies in particular, operates as

a common carrier by railroad engaged in interstate commerce. The Frisco serves an area which includes Texas, Missouri, Oklahoma, Arkansas, Tennessee, Alabama and Florida. It is an important part of the national transportation system. The defendant in this case, the St. Louis, San Francisco and Texas Railway Company, is necessarily chartered under the laws of Texas to comply with Article 6260, Vernon's Annotated Texas Civil Statutes. A portion of the Texas subsidiary's interstate system, including its home office and one of its railroad yards or terminals, is located in Fort Worth, Texas.

The same certification of the Union and the same collective bargaining agreement relate to all of the units in the entire Frisco system.

One of the classifications of employees engaged by the Railroad is that of "Yardmaster". The work of such classification is now and for the foreseeable future will be necessary to the conduct of the Railroad's operation. There is presently in effect between the Union and the Railroad a collective bargaining agreement covering the duties, wages and working conditions of yardmasters of all grades involved in this case. The agreement, as amended from time to time, has been in force since 1945. The last revision was effective February 1, 1957. The agreement has never been terminated.

The 1957 version of the "Rules of Transportation Department" sets out in detail the duties of the various employees engaged in the actual oper-

ation of the Railroad. The rules are in a bound, printed booklet, which has on its cover the title: "Rules of the Frisco System". Such printed rules are no part of the collective bargaining agreement, and do not constitute any agreement between the Railroad and its employees; but the 1927 version of such rules was in effect at the time the present collective bargaining agreement was made. Insofar as the questions in this case are concerned, there has been no substantial difference in the different publications of the "Rules of the Transportation Department" from 1926 to date. The following is quoted from such rules to show the nature of work required of yardmaster in the Frisco system:

> "816. At stations where yardmaster is employed, trains and engines will be under control of yardmaster, and all employees in train, yard and engine service will be subject to his direction. Road crews of trains in such yards will be responsible for their respective trains and engines until same are taken charge of by the yardmaster or his representative".
>
> "825. Yardmasters will report to the general yardmaster, trainmaster, assistant superintendent or superintendent. They have charge of the yards assigned to them and have supervision of all yard employees and other train and engine men when within yard limits. They will require the proper discharge of duty and observance of rules by all employees subject to their direction.

"826. They are responsible for making up and dispatchment of passenger trains on schedule. Where switching is performed on passenger trains, they will arrange for engine to be available and for the work to be done promptly.

"827. They are responsible for the making up of freight trains with proper tonnage and will arrange to have train properly classified, checked and inspected before leaving time. They will see that conductor is provided with waybills for loaded cars and billing and home route cards for empty cars. They will see that freight assigned to particular trains is forwarded in such trains.

"828. They are responsible for compliance with requirements as to diversions, refrigeration, ventilation and heating of cars of perishable freight, the safe and proper handling of explosives and flammables and the prompt handling of livestock to prevent over-confinement.

"829. They must, unless otherwise provided:

"See that notices are posted on bulletin boards, and that all obsolete notices are removed.

"Arrange for proper inspection of cars; and that cars requiring repairs or transfer are

promptly placed and moved after repairs or transfers are completed.

"Require daily check of waybills racks and see that all cars are moved promptly.

"Make prompt wire report of all accidents and personal injuries.

"See that engine and train men are ready to leave at the appointed time."

On or before October 8, 1962, the Railroad determined to abolish the classification of yardmaster at its Fort Worth yards, and to transfer the duties of said classification to other of its employees outside the bargaining unit represented by the Union. For the purpose of carrying out that plan, the Railroad gave written notice on the above mentioned date to General Yardmaster J. R. Joplin, Jr., Second Yardmaster J. D. Choate; and Third Yardmaster A. C. Mitchell, that the positions held by them would be abolished at the end of their respective tours of duty on October 10, 1962. It was also the intent of the Railroad to abolish the position of Relief Yardmaster held by Roy H. Kendall. The persons named were all of the yardmasters employed by the Railroad in its Fort Worth yards. They were members of the class or craft represented by the Union, and were covered by the bargaining agreement heretofore mentioned. The effect of the plan, if carried out, would have been to eliminate completely the classification of yardmaster, and to transfer the duties of the yardmas-

ter classification to other employees of the Railroad outside the bargaining unit represented by the Union.

The elimination of the four yardmaster positions in the Fort Worth terminal and of the yardmaster classification in general is not made necessary by lack of need for performance of duties heretofore assigned to them, or by anticipation of any reduction in volume of yard traffic. There is no present intention to close the Fort Worth yard. The work of the yardmaster is necessary to the operation of the railroad. It is work that involves discretion and judgment; and it requires experience and training. Under the proposed change, the work would continue; but it would be done by clerks, engine foremen and other employees, with the help of IBM machines. The yardmaster duties would be new and increased responsibilities for those employees, and none of them belongs to the bargaining unit represented by the Union which brought this suit. The Railroad intends to go ahead with the plan, if permitted to do so, even if the volume of traffic increases. It is anticipated that the present force, without the yardmasters, will be adequate to absorb their duties.

There is no more reason for eliminating the classification of yardmaster in the Fort Worth terminal and having its duties absorbed by employees of other bargaining units than there would be for so doing in any other yard in the Frisco system. Insofar as the questions in this case are concerned, the

conditions affecting the need or lack of need for the yardmaster classification are not substantially different from those existing throughout such system.

The proposed change in the Fort Worth terminal is not the only action of that type which has recently occurred in the Frisco system. Similar moves have been made in yards in Fort Smith, Arkansas; in Enid, Oklahoma; and in Cape Girardeau, Missouri. That there were even additional ones in terminals not specifically identified is indicated by the following fact laden question asked by counsel for the Railroad of the Union's witness Schoch, after interrogation about the yards above mentioned, and by the answer thereto:

> "Q There are other places on the Frisco involving yard operations where yardmasters once were employed and are now no longer used, isn't that correct?
>
> "A Yes, I believe there are several."

1500 yardmaster positions have been abolished on American railroads as a whole since 1956.

The Court's inferences and deductions may be drawn from the evidence and from matters of which judicial notice may be taken. "The railroad business is of such magnitude and so vitally interwoven with the every day affairs of men that courts will take judicial notice of its general features." 31 *C. J. S.*, p. 564, citing as authority *Williams v. Jacksonville Terminal Co.*, 5 Cir. 1941, 118 F. 2d 324, 326, affirmed 315 U. S. 385 62 S. Ct. 659, 86 L. Ed. 914, and *Old Colony Bondholders v. New York, N. H.* &

H. R. Co., 2 Cir., 1947, 161 F. 2d 413, cert. den. 331 U. S. 858. Such judicial notice includes general facts of common knowledge relating to the construction, maintenance, equipment, operation and financial condition of railroads. 31 *C. J. S.*, p 566, *Williams v. Jacksonville Terminal Co.*, supra; *Old Colony Bondholders v. New York, N. H. & H. R. Co.*, supra; *Van Schaick v. McCarthy*, 10 Cir., 1941, 116 F. 2d 987; *In re Chicago & N. W. Ry. Co.*, 7 Cir., 1942, 126 F. 2d 351, cert. den. 318 U. S. 793; *New York C. & St. L. R. Co. v. Frank*, 1941, 314 U. S. 360, 371, 62 S. Ct. 258, 86 L. Ed. 277, 284.

The Supreme Court, in *New York C. & St. L. R. Co. v. Frank*, supra, said of the affiliated companies making up the Nickel Plate Road: ". . . It was a matter of common knowledge that the constituent companies were heavily in debt for which no provision had been made other than by attachment to the new corporation under state law . . ." 314 U. S., at 371, 86 L. Ed., at 284.

Old Colony Bondholders v. New York, N. H. & H. R. Co., supra, said of the railroad there involved that, ". . . the court may take judicial notice that war earnings have ended and costs of labor and materials have advanced." 116 F. 2d, at 423.

Van Schaick v. McCarthy, supra, holds that: ". . . The court will take judicial knowledge of the fact that local traffic has largely been taken over by buses and trucks, and that railroads must depend largely upon through traffic." 116 F. 2d, at 991.

Michelson v. Penney, 2 Cir., 1941, 135 F. 2d 409,

and *Humble Oil & Ref. Co. v. Luckel,* Tex. Civ. App., 154 S. W. 2d 155, error refused, want of merit, do not involve railroads; but they support the principle of the other cases above cited.

The Court will take judicial notice that there has been great progress in automation and technology in the railroad industry in the past quarter of a century; that the other phases of such industry have not kept pace with that progress; and that both railroad management and labor face extremely serious problems, financial and otherwise, as a result thereof requiring joint consideration to reach a solution that will make it possible for the industry and its workmen to survive.

It is a logical deduction from the evidence admitted in this case, and from the above stated matters of which the Court takes judicial knowledge, that the Railroad regards the entire classification of yardmaster as being obsolete; that it has felt and now feels that abolition of the classification and absorption of its duties by other employees would eliminate waste; and that it plans to get rid of the classification by releasing the yardmasters terminal by terminal in its lines. It is further concluded that the plan was part of an over-all one applicable to the Frisco system.

A yardmaster attains his position by progress through lower jobs, such as those of engine helper and foreman. The result is that he usually has seniority over employees in the lower classifications, and is entitled to displace one of them with lesser

seniority, if his job as yardmaster plays out. The other classifications are outside the collective bargaining unit represented by the Union. The displaced employees would have the same right to assert seniority over those in lower classifications in the yard. Those conditions existed in relation to each of the individuals involved in this case. The chain reaction which would result from the abolition of the yardmaster classification is readily apparent.

The Railroad has been and is attempting to effect the change here involved unilaterally, without giving notice to the Union under Section 6 of the Railway Labor Act, and without any intention or attempt to comply with any of the procedures provided by the Act for helping settle major disputes.

No claim or grievance as to the Railroad's plan and effort to abolish the yardmaster classification has been filed by any party, either through the procedures of the Railway Labor Act in connection with the National Railroad Adjustment Board, or through those set up in Section 11 of the collective bargaining agreement.

The Court granted a temporary restraining order. When the case was heard on its merits, the parties asked for time to submit briefs; and it was agreed between them that the status quo as to the four yardmasters named in the complaint would be maintained until the judgment by this Court on the merits.

The Railroad would have put its plan into effect

on October 11, 1962, if the temporary restraining order had not been granted. The status quo has been maintained only as a result of the above mentioned agreement. If a permanent injunction is not granted, the Railroad will proceed unilaterally to carry out its plan, with the result that the Union will suffer irreparable injury for which it will have no adequate remedy at law.

The opinion of the Court of Appeals in *Brotherhood of Locomotive Engineers, et. al. v. Baltimore & Ohio Railroad Company, et al.,* supra, came out before the expiration of the time given the parties hereto for filing briefs. The decision in that case appeared to have such an important bearing on the issues in the present suit that it was concluded to await the decision of the Supreme Court on petition for writ of certiorari. The Supreme Court made a final disposition of that case in one proceeding on March 4, 1963, in which it granted certiorari and affirmed the judgment of the Court of Appeals. 9 L. Ed. 2d 754.

Since there is little disagreement between the parties over the position of the Railroad, as made by its pleadings and briefs on file, it will be stated first. It is that this suit involves merely a grievance or complaint over a matter confined to individuals in a local situation, and that the purpose of it therefore is only to seek an interpretation of the existing collective bargaining agreement in a particular fact situation. The Railroad maintains that for such reasons the dispute is a minor one over

which the National Railroad Adjustment Board has exclusive jurisdiction.

On the other hand, the Union insists that its claim is not predicated upon an interpretation of the collective bargaining agreement, and that it makes no attempt to allege a cause of action under such agreement. It contends that the unilateral action of the Railroad in deciding upon, and in taking steps to put into effect, its plan to eliminate the yardmaster classification in the Fort Worth yard alone or on the entire line generally created a major dispute which required the Railroad to give notice to the Union, to negotiate and bargain with it, and to comply with the other conciliatory and mediation procedures provided in the Railway Labor Act for the handling of such disputes. Its position is that the cause of action which it alleged is based upon a violation by the Railroad of the statute rather than of the contract.

The Railway Labor Act classifies the two types of disputes in subdivisions (4) and (5) of Sec. 151a, 45 U. S. C. A., as: "(4) . . . disputed concerning rates of pay, rules, or working conditions; (5) . . . disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." While the Act itself does not make any reference to major disputes and minor disputes in those terms, the courts have consistently typed the first class of dis-

putes above as being major, and the second as being minor. *Elgin, J. & E. R. Co. v. Burley,* 1945, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; *Slocum v. Delaware,* L. & W. R. Co.; 1950, 339 U. S. 239; 70 S. Ct. 577; 94 L. Ed. 795; *Railroad Telegraphers v. Chicago & N. W. R. Co.,* supra; *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.,* supra, (citations to U. S. and S. Ct. not yet available).

Elgin. J. & E. R. Co. v. Burley, supra, discusses the differences between disputes involving negotiations to secure collective bargaining agreements, the formation of them, or an effort to change the terms of them, and disputes over grievances relating to the interpretation or the proper application of the terms of an existing agreement to a specific situation. In that connection, the Court said:

> "In general the difference is between what are regarded traditionally as the major and minor disputes of the railway labor world. The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment.
>
> "The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments

> of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so. Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment." (325 U. S. 723-724, 89 L. Ed. 1894-1895).

The procedure for handling each class of dispute set out in the Railway Labor Act, 45 U. S. C. A., Secs. 152-160, is fully discussed in each of the four cases above cited.

They say that the Act seeks to induce agreement by requiring good faith negotiations as the first step in resolving each type of dispute. 45 U. S. C. A., Sec. 152. After that, the procedure is different for each class. Where the parties fail to accomplish a settlement of a major dispute in the initial negotiations, they must exhaust administrative machinery for mediation, arbitration (if acceptable to both), and adjustment of the controversy. 45 U. S. C. A., Sec. 152, 155-159. Under certain circumstances, the President may appoint an Emergency Board if nothing is accomplished by the use of the other methods provided by the Act. 45 U. S. C. A., Sec. 160. There is, however, no legal compulsion at any state on the parties to agree. The purpose of the Act is to induce the parties to make a voluntary settlement by providing "every facility for bringing about an agreement" and by applying "pressures for mobilizing public opinion." *Elgin, J & E. R. Co. vs. Burley*, supra, at p. 725 of 325 U. S. and p. 1895 of 89 L.

Ed. If exhaustion of all statutory methods avails nothing, the parties are relegated to self-help in adjusting the dispute. *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, supra.

The so-called Section 6 notice which is required to be given in controversies involving major disputes is provided for in 45 U. S. C. A., Sec. 156:

> "Carriers and representatives of the employees shall give at least thirty day's written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted up, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Sec. 156 must be considered in connection with Sec. 152, Seventh, which says:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working

> conditions of its employees, *as a class*, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." (Emphasis added).

If negotiations fail to settle a minor dispute, the second step is submission of the matters to the National Railroad Adjustment Board. Secs. 2 and 3, Railway Labor Act, 45 U. S. C. A., Secs. 152 and 153. ". . . Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged in the initial duty of negotiation . . ." *Elgin, J. & R. E. Co. v. Burley*, supra, at p. 727 of 325 U. S. and p. 1896 of 89 L. Ed.; 45 U. S. C. A., Sec. 153, First (i). From then on, the procedure does not depend upon the will of the parties. The Adjustment Board, after due notice and hearing, has the authority to make an award which is binding on the partes. ". . . Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements through the nation's railway systems." *Slocum v. Delaware, L. & W. R. Co.*, supra, p. 243 of 339 U. S. and 800 of 94 L. Ed.

The many dissenting opinions in the Supreme Court cases show that while the Justices may agree upon the test for determining whether a dispute is major or minor, there is often disagreement even among them over the result of the application of the test.

Many cases have been cited in the several briefs

filed by the parties; but the Court is of the opinion that the question in this case is settled by the decisions in *Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R. Co., et al.*, supra, and *Railroad Telegraphers v. Chicago & N. W. R. Co.*, supra. The conclusion from the opinions in those cases is that the controversy between the Union and the Railroad in the present suit is a major dispute.

The plaintiffs in the *Baltimore & Ohio R. Co.* case were the five separate labor organizations representing respectively the Locomotive Engineers, the Locomotive Firemen and Enginemen, the Railroad Trainmen, the Railway Conductors and Brakemen, and the Switchmen on a nationwide scale. Sixteen railroad companies were sued individually and as representatives of a class of more than two hundred other railroads. The Organizations prayed for a judgment declaring unlawful a "Promulgation of Revision in Work Rules" issued by the defendants, affecting the Carriers' operating employees represented by the Organizations in collective bargaining under the Railway Labor Act. The Carriers claimed that they were issuing the promulgation for the purpose of drawing up "sound new work standards for the railroad industry" to meet the "changes in the light of the great technological improvements in the industry." The opinion of the Court of Appeals, at page 506, says that the proposed changes contemplated the following:

> "1. The elimination of existing rules and agreements requiring the use of firemen on

other than steam locomotives when used in yard and freight service.

"2. The revision of rules governing the basis of pay and the assignments of railroad operating employees used in through freight and straightaway passenger service.

"3. The elimination of rules requiring the use of a stipulated number of trainmen in road train crews and a stipulated number of brakemen (helpers) in yard ground crews.

"4. The elimination of rules requiring the use of operating employees on motor cars and self-propelled work machines used in inspection, construction, repair and maintenance work, and

"5. Various miscellaneous and minor other changes which are not material in these proceedings."

The Court of Appeals adopted the following summary by the Carriers of the effect of the promulgation (p. 512):

". . . The promulgation simply gives the carriers the right to determine the number of trainmen that shall be used in road train crews and of that number how many are to be assistant conductors, ticket collectors, baggagemen and brakemen. All such employees are now represented by the same organizations for purpose of collective bargaining. It likewise gives the carriers the right to use road crews in yard service and yard crews in road service; but the several classes or crafts involved are repre-

sented by the same organizations whether they work in road or yard service. It is clear, therefore, that the organizations' real complaint goes to the carriers' assignment of work. The Railway Labor Act does not deal with this subject."

After it appeared that results would not be obtained from the suggestions that the Organizations work out with the Association of American Railroads a method other than that provided by statute looking towards drawing up new work standards, the Carriers served on the Organizations Section 6 notices of their intended changes, which were the same ones as those involved in the subsequent litigation. The procedures of the Railway Labor Act relating to major disputes, with the exception of the appointment by the President of an Emergency Board under Sec. 10, were exhausted without solving the problems. It was then that the Carriers issued their promulgations that brought about the filing of the injunction suit by the Organizations. The following quotations from the opinion of the Supreme Court show that all of the courts which passed on the case recognized that it involved a major dispute, and that a Section 6 notice was required and proper:

"The District Court found that both parties had exhausted all of the procedures available under the Railway Labor Act, and that they were therefore free to resort to self-help, restricted only by the possibility of the appointment of an Emergency Board by the President

under the provisions of ≠ 10 of the Railway Labor Act." 9 L. Ed. 762.

(The Emergency Board is appointed only in connection with major disputes. 45 U. S. C. A., Sec. 160).

"The Court of Appeals concluded, as had the District Court, that the Railway Labor Act procedures had been exhausted, and that *therefore the* ≠ 6 *notices served by the Carriers were proper.*" (Emphasis supplied). 9 L. Ed. 762.

"The only question presented, therefore, is whether the record before us contains the finding of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for *major disputes such as that involved here.*" (Emphasis supplied). 9 L. Ed. 763.

The case of *Railroad Telegraphers v. Chicago & N. W. R. Co.*, supra, is also authority for holding that the controversy here is a major dispute. In that case, the Railroad submitted to several proper state regulatory commissions a plan whereby a number of small stations on its lines would be closed and the communities would thereafter be served by central agencies to be created, rather than by the local station agents then employed at such station. The fundamental problem in that case, too, involved modernization of an antiquated system of work standards. Traffic and rural conditions existing when the Railroad was organized in the middle of the 19th century required establish-

ment of railroad stations on an average of seven to ten miles apart, with an agent in each one. The many changes in railroad equipment and in transportation methods had caused the business at the one-man stations to dwindle to the point where the agents were working an average of less than one hour in a normal eight-hour day. The Public Utility Commission of South Dakota found in its hearing on the plan that the workload of the agents in some of the small stations in that State was only twelve minutes a day. The Railroad proposed to abolish many of those small stations, and to set up central agencies to do their work on such number of area bases as would be economically justified. "The plan would necessarily result in loss of jobs for some station agents and telegraphers, members of the petitioner union." (362 U. S., at 332, 4 L. Ed. 2d, at 778). After its hearing, the South Dakota Commission entered an order directing that the Railroad make the plan effective immediately as it applied to that State.

While the proposed plan was pending before the regulatory bodies of several states, and before the decision in the South Dakota phase of it, the Union, as the properly certified bargaining agent of the employees affected by the plan, served notice under Section 6 of the Railway Labor Act that it wanted to negotiate with the Railroad for the purpose of seeking amendment of the existing collective bargaining agreement by adding thereto a rule requiring consent of the Union before the Railroad could abolish or discontinue any position of a member of such union in existence on December 3, 1957.

The Railroad answered that the law vested the proper state utility commissions with the exclusive power to determine whether station agencies should be discontinued; that the Union had no right to protest or to seek relief from any source other than the various state commissions on hearings on the plan; and that the Union's request did not raise a bargainable issue under the Railway Labor Act. The Railroad offered to, and did, meet with the Union for the purpose of negotiation and mediation, with the understanding that it was not waiving its position. Nothing was accomplished, and the Union voted to call a strike.

The Railroad filed suit seeking to enjoin the impending strike on the basis that it was illegal, because the Union's contract demand was not a lawfully bargainable subject under the Act. The Carrier asserted that it had the right to abolish the positions without the consent of the Union, under the authority of any proper order of a state utility commission. The Union contended that Sec. 8 of the Norris-LaGuardia Act, 29 U. S. C. A., Sec. 108, deprived the Court of authority to grant injunctive relief because the case involved a labor dispute which the Railroad had refused to recognize and negotiate in good faith as a legally bargainable issue under the Railway Labor Act. On final hearing, the District Court concluded that the Union's demand did relate to "rates of pay, rules and working conditions", and was therefore a bargainable issue under the Railway Labor Act. It held that the strike called to enforce acceptance of the demand was therefore not unlawful, and refused to

grant the permanent injunction. The Court of Appeals disagreed with the holding of the District Court, and reversed and remanded with directions to enter the injunction enjoining the strike. *Chicago & N. W. R. Co. v. Railroad Telegraphers,* 7 Cir., 1959, 264 F. 2d 254. The Supreme Court reversed the judgment of the Court of Appeals on the ground that the controversy did present a major dispute which was legally bargainable under the Railway Labor Act, and that the strike was therefore not unlawful and subject to being enjoined. In so holding, the Supreme Court said:

> ". . . The change desired just as plainly referred to 'conditions of employment' of the railroad's employees who were represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment . . ." 362 U. S., at 336, 4 L. Ed. 2d, at 780.
>
> ". . . In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively . . ." 362 U. S., at 338, 4 L. Ed. 2d, at 781.
>
> "Only a word need be said about the railroad's contention that the dispute here with

the union was a minor one relating to an interpretation of its contract and therefore one that the Railway Labor Act requires to be heard by the National Railroad Adjustment Board. We have held that a strike over a 'minor dispute' may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635. But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement. Particularly since the collective bargaining agreement which the union sought to change was a result of mediation under the Railway Labor Act, this is the type of major dispute that is not governed by the Adjustment Board." 362 U. S., at 341, 4 L. Ed. 2d, at 783.

It is true that a Section 6 notice was served in each of the last two cases cited above. In one of them, it was the union that served the notice, and in the other it was the railroad. However, in each action, the party on whom the notice was served contested the question of whether there was in fact a major dispute involving a bargainable issue justifying a Section 6 notice; and it lost the contest.

The many other cases cited by the parties hereto have been read and studied. A discussion of each of them would only lengthen this opinion without adding value to it. The cases hereinabove cited and considered in detail are the most recent of

those in point decided by the court of last resort. The authorities cited by the Railroad in its briefs are distinguishable upon one or more of the following grounds:

1. They involved specific maladjustments of a detailed or an individual nature.

2. They were concerned only with abolition of individual positions rather than of a bargaining unit classification.

3. The conduct complained of was not calculated to terminate the collective bargaining agreement by destroying the subject matter of it.

In the present case, the Railroad's admitted plan is to get rid of the yardmaster classification in its terminal at Fort Worth, the city where its home office is located. It concedes that such contemplated action is not based upon lack of need for performance of the duties of yardmaster as they now exist, or upon any decrease in volume of traffic, present or anticipated. Such of the duties of yardmaster as have been left, after the advent of automation some time ago, will be parceled out among the Railroad's employees in Fort Worth outside the bargaining unit represented by the plaintiff union. In other words, if the plan is carried out, the work heretofore done by the yardmasters and the volume of traffic will still be there, but the yardmasters will not. That unquestionably amounts to abolishing the classification of yardmaster, not merely to discharging individual employees. The bargaining

agreement certainly contemplated that the work theretofore performed by yardmasters would continue to be done by them as long as it existed. That was the very basis of the agreement. The plan is one to make a change in the working conditions of the yardmasters, as a class, and is in the teeth of Sec. 2, Seventh, of the Railway Labor Act prohibiting a railroad from taking action to change the working conditions of its employees, as a class, as contemplated by the agreement, without giving a Section 6 notice and proceeding thereafter on the basis provided for handling major disputes. 45 U. S. C. A., Sec. 152, Seventh.

While it is logical to conclude from the evidence in this case that the plan to get rid of the yardmaster classification applied to the entire Frisco system, the holding in this case could be based alone on the contemplated action in the Fort Worth yards. A bargainable issue can exist when an intended action affects only a part of a railroad's employees in a bargaining unit. It was only the agents in the one-man stations who were affected in the *Telegraphers* case, supra; but it was there held that the intended change required a Section 6 notice and negotiation. The Union in the present case was not required to sit idly by and wait for its yardmaster classification to be eliminated in one swoop over the entire Frisco system or over just the lines of the Texas subsidiary, when it could see that its classification was being effectively nibbled away in a series of actions in separate terminals.

The Railroad contends that the Union should not

be permitted now to insist that the controversy involved is a major dispute, because some of the former complaints regarding the abolition of yardmasters' positions were submitted to the National Adjustment Board. The awards of the Adjustment Board do no more than settle the particular incident being decided. They do not even have any binding effect on the Board itself as precedents. *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. at p. 243, and 94 L. Ed., at p. 800. The Union had the right to seek full redress under the Railway Labor Act when it awoke to the real result that would inevitably follow from the total of a series of acts which could have appeared at first to be local in nature. When the Railroad sought to do away with the yardmaster classification in the terminal located in the center it had selected for its operations in Texas, it was time for the Union to realize that the Railroad was acting on the basis that the position of yardmaster was obsolete. The deep interest of the public in matters calculated to affect the uninterrupted operation of its interstate transportation system requires that this problem be faced for what it really is now, regardless of any prior actions before the Adjustment Board involving specific incidents.

The Railroad insists that the dispute involves only a grievance infraction under the agreement that should be handled as a local matter under Rules 11 and 12 thereof, or a question of interpretation of such existing agreement over which the National Railroad Adjustment Board has exclusive jurisdiction. It says that the controversy is there-

fore only a minor dispute. That claim does not fit the scope of the intended action, the effect of its results on the contract, or the possible consequences to the general public. It is an action that will change working conditions as they are contemplated by the agreement. If the plan continues, it will terminate that agreement by destroying the subject matter thereof. It is only reasonable that the Union will use every legal means to keep from losing the contract by planned erosion. That kind of issue does not meet the test of a minor dispute given in any of the cases heretofore cited, nor in the Supreme Court's terse definition of that term in the recent case of *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 1957, 353 U. S. 30, 33, 77 S. Ct. 635, 1 L. Ed. 2d 622, 625:

> ". . . These are controversies over the meaning of an existing collective bargaining agreemen in a particular fact situation, generally involving only one employee . . ."

There is nothing in the grievance procedure set up by the agreement that was intended to or could cope with the problem here. The Adjustment Board does not have the facility or the power to handle it.

The answer to the contention that this case involves only an interpretation of the existing agreement is that the Union's cause of action is based upon an alleged violation of its statutory right under the Railway Labor Act to bargain over a major dispute. The Railroad has tried to convert the suit into one calling for an interpretation of the contract by using its answer to inject that

question into the case. The Act does not give a defendant, railroad or union, the power to change a major dispute into a minor one merely by claiming in its answer that some provision of the contract is applicable.

The Railroad defends on the ground that it is under no duty to maintain yardmasters' positions, and that it has the right to discharge them on 48 hours notice. It bases that defense on the following portions of the collective bargaining agreement:

> "Rule 15. Yardmasters will be given 48 consecutive hours advance notice of reduction in force, with copy to General and Local Chairmen."
>
> "Rule 16 (e). This agreement shall not be construed as an obligation to maintain or establish yardmasters' positions, nor as restricting the Company's right to discontinue yardmaster positions now or hereafter established."

A consideration of the agreement as a whole, construed in the light of its purpose, compels the conclusion that the language quoted does not purport to give the Railroad the power or authority to terminate the contract by eliminating the yardmaster classification entirely, whether done at one time or by a deliberate unilateral process of attrition. A reasonable construction is that the rules contemplate an ordinary reduction in force due to decrease in volume of traffic or to lack of need for performance of the duties of yardmaster. It is hardly credible that the Union would have agreed to any-

thing permitting the transfer of the duties of its classification to employees outside its bargaining unit. The provisions of a formal contract for its own termination usually leave no question about their purpose and the means of bringing about the demise.

Even if the Railroad had the full right it claims under the contract, the Union would not be deprived of the right to bargain over the intended action to change working conditions. In the *Railroad Telegraphers* case, supra, it was conceded that under the bargaining agreement there existing, the carrier had the legal right to release its station agents. That was the right about which the union wanted to bargain. However, the carrier in that case had an even stronger position than a claim of contract right. The Public Utility Commission of South Dakota had ordered it to take action that would necessarily result in the dismissal of a number of the agents. The legality of the Commission's order does not appear to have been questioned; but the Supreme Court held that the carrier had to bargain with the union over its plan to create the central agencies. The Railway Labor Act does not limit the scope of its provisions regarding bargainable issues to those cases where the purpose of the intended plan is prohibited.

The truth, taken from the evidence in this case and from those general matters of common knowledge relating to the condition, equipment and operation of the railroads, is that the fundamental problem of obsolescence of work standards over

which the Railroad and the Union are arguing in this case is closely kin to those confronting the five on-train unions and the more than two hundred carriers in *Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R. Co., et al.*, supra. The quotations that follow from documents of the respective parties, as they are quoted in the opinion of the Court of Appeals in that case, show that about the only important thing the railroads and the unions there have agreed upon is that the solution of the problem calls for the best help that can be provided. The letter from the head of the Association of American Railroads to the President of the United States said:

> "Finally, and perhaps most important, drawing up new work standards for the railroad industry has become so complex and challenging that the machinery provided for settling ordinary disputes appears hopelessly inadequate to cope with this task. Only a new, broader-based and determined approach has real hope of coming up with workable and fair solutions." 310 F. 2d at 506.

The unions later asserted in the course of the negotions "that the work rules problem is 'too difficult' to be resolved under the regular procedure of the Railway Labor Act." 310 F. 2d, at 508.

It is now showdown time for management and labor in the railroad industry. Their standards must be modernized and reconciled with technological progress. As far as is possible, the opportunity should be afforded all the railroads and all the

unions to consider the general problems on the same plane. A strike by any one union alone could seriously impair, if not completely paralyze, the whole interstate transportation system. The contest over obsolescence shown by the evidence to exist between the Railroad and the Union in this case calls for a major overhaul job. It should not be cheapened by treating it as one which can be cured by patchwork or a minor tune-up. The solution of the problem presented in this case will require the use of "every facility for bringing about an agreement" and the application of the "pressures for mobilizing public opinion," mentioned in *Elgin, J.&E.R. Co. vs. Burley*, supra (325 U. S., at p. 725, and 89 L. Ed., at p. 1895), as being provided for working out major disputes. Nothing can be accomplished by holding that the Railroad should continue to act unilaterally. Security and stability of jobs in an entire bargaining unit classification are at stake.

The parties hereto will be directed to take the course under the Railway Labor Act which will require them to meet and negotiate under the procedures provided for settling major disputes, where both sides of the question will be presented and the public will have some assurance that any adjustment found to be necessary will be cushioned by tempering business efficiency with humaneness.

This opinion will serve as findings of fact and conclusions of law under Rule 52 (a), Federal Rules of Civil Procedure.

Judgment will be entered for the plaintiff as

prayed for, in the light of the findings and conclusions expressed herein.

Signed this 10th day of April, 1963.

JUDGE

/s/ Leo Brewster

APPENDIX C

OPINION OF THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20570

ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY

Appellant

versus

RAILROAD YARDMASTERS OF AMERICA, AFL-CIO,

Appellee

Appeal from the United States District Court for the Northern District of Texas.

(March 4, 1964.)

Before TUTTLE, Chief Judge, and HUTCHESON and GEWIN, Circuit Judges.

TUTTLE, Chief Judge: On October 8, 1962, the appellant Railroad notified its four yardmasters at Forth Worth, Texas, that the positions of yardmaster would be abolished at the end of their respective tours of duty beginning on October 10, 1962.

On October 10, 1962 the appellee filed a complaint seeking to enjoin the carrier from proceeding with its announced intention. The trial court granted an ex parte temporary restraining order and then, rather than having the case set down for a hearing for preliminary injunction, the parties consented to permit the restraining order to stay in effect until a hearing was had on the merits on a permanent injunction. Upon such hearing the trial court granted the permanent injunction as prayed for. The carrier has appealed.

The basis for the complaint as found by the trial court was its allegation that the carrier's action violates Section 2, First and Seventh, and Section 6 of the Railway Labor Act relating to proposed changes in agreements governing rates of pay, rules, and working conditions. Section 6 of the Railway Labor Act provides in pertinent part:

"Carriers and representatives of the employees shall give at least thirty days' written no-

[1] Typical of these notices is the following:

Fort Worth, October 8, 1962

Mr. J. R. Joblin
General Yardmaster
Fort Worth, Texas

"Effective with end of tour of duty Wednesday, October 10, 1962, General Yardmaster Position, Fort Worth, Texas, is abolished.

/s/ R. A. Rorie

tice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. . . . In every case where such notice of intended change has been given, . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 5 of this Act . . ."

The Union contended that under the terms of this provision the carrier could not unilaterally take the contemplated action until it had complied with Section 6 and processed the bargaining on the proposal in accordance with the provisions of the Act relating to bargaining.

The carrier's answer to the complaint was relatively simple and uncomplex. It asserted simply that in pursuing the action complained of it was acting strictly within the terms of the existing agreement with the Union which, by Rule 15, provides:

"Yardmasters will be given 48 consecutive hours advance notice of reduction in force with copy to General and Local Chairman."

and by Rule 16(e), provides:

"This agreement shall not be construed as an obligation to maintain or establish yard-

masters' positions, nor as restricting the Company's right to discontinue yardmaster positions now or hereafter established."

The carrier was doing, so it said, what the contract authorized it to do and it was not doing what the Union said it was, to-wit: Seeking or proposing "an intended change in *agreements* affecting rates of pay, rules, or working conditions." So it is, that the carriers take the position that rather than being off base by not proceeding under Section 6 seeking to bargain for a change in existing agreements, it was strictly in line by acting under the existing contract and that it was in fact the Union that was off base in going to court to litigate the issue rather than pursuing grievance procedures by challenging the right of the carrier to abolish the positions under the terms of the existing contract and referring the issue to the Railroad Adjustment Board which the carrier contends has exclusive jurisdiction where a contract interpretation is involved.

At the injunction hearing the trial court received evidence tendered by the Union undertaking to show that the abolition of the jobs in Fort Worth was but one step in a proposal to abolish all yardmaster jobs or "classifications." However, the trial court, although finding that the proposed terminations in Fort Worth were part of a plan by the carrier to abolish all yardmaster jobs on the system and transfer the work theretofore having been performed by the yardmasters to other personnel and to mechanical equipment, stated that its finding

and conclusion would be the same were there only the Fort Worth jobs involved.

The parties seem agreed on one proposition. That is, certain types of disputes arising between carriers and their employees may be of such a nature that the Railroad Adjustment Board has exclusive jurisdiction over them. In such case a suit may not be filed in the courts until after the procedures provided for under the Act are complied with. Probably more for convenience than anything else, the disputes in this category have been classified by the courts as "minor" disputes. Another point of agreement between the parties is that there are other disputes or issues that may arise between carriers and their employees as to which the first approach must be made to the other party to the dispute in order to commence conferences which must thereafter be pursued through the Mediation Board if either party requests it, all as set out in Section 5 of the Act. Disputes of this nature are probably, likewise for convenience, known as "major" disputes.

While the parties are as far apart as the poles in their contentions as to whether the issue before us is a minor or a major dispute, the courts have frequently discussed the two categories. Also, reference to the language of Section 6, quoted above, is itself fairly clear in that it requires the bargaining procedure only where there is an intended change *in agreements* affecting rates of pay, rules, or working conditions. Obviously, therefore, if there is no intended change in an existing contract

or agreement there is no requirement under Section 6 that the bargaining procedures be followed.

In discussing the nature of disputes dealing with the rights of the parties between carriers and employees, the Supreme Court in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, said:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore *the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.*
>
> *"The second class, however, contemplates the existence of a collective agreement already concluded, or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.* The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g. claims on account of personal injuries. In either case the claim is to rights accrued not merely to have new ones created for the future.
>
> "In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world." (Emphasis added.)

See also *Order of Railway Conductors v. Pitney*, 326 U. S. 561.

This Court had occasion to deal with this problem in *Missouri-Kansas-Texas Railroad Company et al v. Brotherhood of Locomotive Engineers et al*, 5 Cir., 266 F.2d 335. In deciding that the challenged conduct in that case which involved changing the assignments of employees in freight service, changing terminals in that class of service, and abolishing a number of positions, this Court said:

> "Without intimating any view as to their validity, we think it clear that the respective *contentions* of the Railroad Companies and of the employees are based upon existing agreements; their *claims* are to rights accrued and not to have new rights created for the future. The dispute is thus a 'minor' dispute, the resolution of which is committed to the National Railroad Adjustment Board. Primary jurisdiction of that Board cannot be defeated by the emphasis with which any party asserts that its position is clearly the only rightful one, nor would it be appropriate for this Court to discuss the relative merits of questions which must be decided by that Board." 266 F.2d at 340.

It seems clear that the appellee has fallen into the error of assuming that whenever an issue arises between the carrier and the Union relating to "rates of pay, rules, or working conditions" then Section 6 must be invoked. In its brief the appellee says, "if, as in the instant case, the court's preliminary interpretation of the contract reveals that the dispute

is over a change in 'rates of pay, rules, or working conditions,' . . . then it is incumbent upon the court to retain jurisdiction, . . ." as for the solution of a "major" dispute. So, too, the trial court in its carefully considered opinion seems to have concluded that the *effect* of the proposed conduct, even though authorized by contract, was of such major significance that it must be deemed a "major" dispute. It is clear that in solving the problem presented to it, the trial court actually construed the language of Rule 16(e) as not authorizing the discontinuance of the yardmaster positions, thus clearly demonstrating that it was rejecting the carrier's *construction* of the contract of employment.

Unless we are to ignore completely the language of Rule 16(e) which on its face, according to the ordinary understanding of the English language does authorize the abolition of yardmaster positions, we are at a loss to understand how it could be decided that the rights of the Union can be determined without a construction of the employment contract or agreement. We do not, of course, any more than did we in the *M-K-T* case *supra*, attempt to construe the contract. This is to be done by the appropriate tribunal. We do say that a defense based upon the language of Rule 16(e) raises a substantial issue as to the interpretation of the contract. It is not a fictitious or merely colorable issue. Before a tribunal can decide that the terminations at issue were not justified, it must construe the language of Rule 16(e).

Appellee strongly stresses the Supreme Court

cases, *Railroad Telegraphers v. Chicago & Northwestern R. Co.*, 362 U.S. 330, and *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co.*, 372 U. S. 284, in support of its argument to the effect that this is a major dispute. We find no support for their position in these cases. Nor do we find any tendency on the part of the Court to depart from the traditional concepts of major and minor disputes. Discussing the applicability of the Norris-LaGuardia anti-injunction statute in the *Railroad Telegraphers* case the Court said:

> "Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement."

362 U.S. 330 at page 336, and at page 341 the Court said:

> "But it is impossible to classify as a minor dispute this dispute relating to a major *change*, affecting jobs, *in an existing collective bargaining agreement.*" (Emphasis added)

That the dispute in the *Brotherhood of Locomotive Engineers* case deals with a change in "*agreements* affecting rates of pay, rules, and working conditions" is plain from a reference to the opinion of the Court of Appeals in that case. See 310 F.2d (7 Cir.) 503, 506.

It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court

erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedures set forth in the contract.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

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No. 1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

RAILROAD YARDMASTERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Agreement Between the Parties	2
Unreported Decision Cited By Petitioner	3
Statement	3
Reasons for Denying the Writ	10
I. The court below properly held that the issues here involved are within the exclusive jurisdiction of the National Railroad Adjustment Board	10
II. The petition fails to state any cognizable ground for granting the writ	17
III. This Court has consistently denied certiorari in cases where similar issues have been presented	25
Conclusion	27
Appendix A—Railway Labor Act, Section 2 Sixth	28
Appendix B—Excerpts from Labor Agreement between Petitioner and Respondent	29
Appendix C—Unreported decision, Aaxico Airlines, Inc. v. Air Lines Pilots Association, International, et al.	34

AUTHORITIES CITED

CASES:

Aaxico Airlines, Inc. v. Air Line Pilots Association (C.A. 5, April 15, 1964) ... F. 2d ..., 55 LRRM 2982, 49 CCH LC ¶ 18,886	3, 24
B. & O.R. Co. v. United Railroad Workers, 271 F. 2d 87 (C. A. 2, 1959)	19, 21
Brotherhood of Locomotive Engineers v. Louisville and Nashville R. Co., 372 U.S. 33 (1963)	16
Brotherhood of Locomotive Firemen v. Central of Georgia Ry., 199 F. 2d 384 (C. A. 5, 1952)	12

Page

Elgin, Joliet and Eastern Railway Company v. Burley, 325 U.S. 711 (1945) 4, 9, 10
Fiberboard Paper Products Corporation v. N.L.R.B., 322 F. 2d 411 (C. A. D. C. 1963) cert. granted 375 U.S. 963 23
General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company, 320 U.S. 323 (1943) 20
Hilbert v. Pennsylvania R. Co., 290 F. 2d 881 (C. A. 7, 1961) cert. den. 368 U.S. 930 ..... 12, 25
International Assn. of Machinists v. Eastern Air Lines, 320 F. 2d 451 (C. A. 5, 1963) 12
In re Hudson & Manhattan Railroad Company, 172 F. Supp. 329 (1959), aff'd 267 F. 2d 941 (C. A. 2, 1959), cert. den. 363 U.S. 843 (1960) 12, 26
King v. Atlantic Coast Line R.R. Co., 323 F. 2d 1005 (C. A. 5, 1963), cert. den. May 25, 1964, No. 904 .. 26
Locomotive Engineers v. M.-K.-T. R. Co., 363 U.S. 528 (1960) 4
Louisville & Nashville Railroad Company v. Brown, 252 F. 2d 149 (C. A. 5, 1958) 12
Missouri-Kansas-Texas R.R. Company et al. v. Brotherhood of Locomotive Engineers et al., 266 F. 2d 335 (C. A. 5, 1959) 4
National Railroad Adjustment Board Award No. 967 (Fourth Division) 8
Norfolk and P.B.L.R. Company v. Brotherhood of Railroad Trainmen, 248 F. 2d 34 (C. A. 4, 1957) cert. den. 355 U.S. 914 (1958) 12, 26
Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946) 4, 11, 17
Pennsylvania R.R. Co. v. Day, 360 U.S. 548 (1959) 19
P.R.R. v. Rychlik et al., 352 U.S. 480 (1957) 19
Rutland Railway Corp. v. Brotherhood of Locomotive Engineers, 188 F. Supp. 721 (1960), aff'd 307 F. 2d 21 (C. A. 2, 1962), cert. den. 372 U.S. 954 ..... 12, 25
St. Louis, San Francisco and Texas Ry. Co. v. Railroad Yardmasters of America AFL-CIO, 328 F. 2d 749 (C. A. 5, 1964) 3
Slocum v. Delaware, Lackawanna and Western R. Co., 339 U.S. 239 (1950) 19
State of California v. Taylor, 353 U.S. 553 (1957) 19

STATUTES: Page

Railway Labor Act (45 U.S.C., 151 et seq.) 3, 5, 10, 15, 18, 20

Report of National Mediation Board to Congress, Fiscal Year ended June 30, 1962 13

IN THE

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OCTOBER TERM, 1963

No. 1116

RAILROAD YARDMASTERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petrtioner's statement of jurisdiction failed to note the stays of the mandate. The Court of Appeals issued its opinion on March 4, 1964, and under the rules of that Court the mandate would have issued after March 25, 1964. On March 23 petitioner filed its Motion to Stay Mandate and by its Order dated March 28, the Court of Appeals granted a thirty-day stay from that date. Petitioner then filed its Motion to Extend Stay of Mandate, dated April 17, 1964, wherein it sought to have the stay extended until June 2,

1964. Pursuant to that Motion the mandate was stayed to and including May 15, and, since the petition was filed on that day, the stay continues in force until the disposition of the petition.

The District Court issued a temporary restraining order upon the filing of this case on October 10, 1962, which by agreement, remained in effect throughout the proceedings before that Court. The District Court's permanent injunction was entered on April 10, 1963.

QUESTIONS PRESENTED

The Court of Appeals has held that the District Court did not have jurisdiction to consider petitioner's suit for an injunction under the Railway Labor Act because the issue presented involved the interpretation of a labor agreement. Thus, the questions presented are:

1. Whether a claim that certain proposed action by a railroad cannot be taken unless a notice of intended change in existing labor agreements is served and progressed under the Railway Labor Act and a defense thereto that the proposed action is authorized by and in conformity with the terms of the existing labor agreements involves the interpretation or application of such agreements within the scope of Section 3 First (i) of the Railway Labor Act.

2. Whether the jurisdiction of the National Railroad Adjustment Board over disputes involving interpretation or application of railroad labor agreements is exclusive.

STATUTE INVOLVED

Petitioner has set forth certain provisions of the Railway Labor Act (45 U.S.C. § 151 *et seq.*) in Appendix A to its Petition. Section 2 Sixth of that Act is set out in Appendix A attached hereto.

AGREEMENT BETWEEN THE PARTIES

Excerpts from the labor agreement in effect at all times involved herein are set out in Appendix B attached hereto.

UNREPORTED DECISION CITED BY PETITIONER

Petitioner has cited the unreported decision rendered by the Fifth Circuit in *Aarico Airlines, Inc.* v. *Air Line Pilots Association* (No. 20931) .... F. 2d .... [55 LRRM 2982, 49 CCH LC ¶18,886]. (Petition, p. 21). That decision is set out in Appendix C attached hereto.

STATEMENT

Petitioner's statement of the case, (Petition pages 3-10) does not present the facts sufficiently to develop the manner in which the case arose, the position of the parties on the question presented or the holding of the courts below. We therefore offer the following statement so that the Court may be more fully advised on these matters.

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Fifth Circuit which reversed a judgment of the United States District Court for the Northern District of Texas which had granted petitioner a permanent injunction enjoining respondent from abolishing yardmaster positions at Fort Worth "unless and until the [Respondent] shall have given proper notice under Section 6 of the Railway Labor Act of intent to make such changes, and shall have exhausted all procedures under the Railway Labor Act for negotiation, bargaining and mediation of major disputes * * *" (R. 231).

Section 6 of the Railway Labor Act is the Section which sets forth the procedure to be followed in order to change an agreement affecting rates of pay, rules or working conditions.

The Court of Appeals held that the District Court erred in entertaining jurisdiction, stating: "It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedures set forth in the contract." 328 F. 2d 749, 753.

This holding was based upon the conclusion of the Court of Appeals that the dispute framed by the complaint was a "minor dispute" under the Railway Labor Act and the decisions of this Court in *Elgin, Joliet and Eastern Railway Company* v. *Burley*, 325 U.S. 711 and *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, and its own holding in *Missouri-Kansas-Texas R.R. Company et al.* v. *Brotherhood of Locomotive Engineers et al.*, 266 F. 2d 335 (C.A. 5, 1959) which holding on the questions here pertinent was approved by this Court in *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528.

The facts upon which the Court of Appeals relied in holding that the District Court lacked jurisdiction are relatively simple and undisputed. The petitioner Union represents yardmasters on the respondent railroad. On October 8, 1962, respondent's superintendent notified its four yardmasters at Fort Worth (three of whom held regular positions, and one of whom held a relief position) that their positions would be abolished at the end of their respective tours of duty on October 10, 1962.[1]

Notice of this character was required by Rule 15 of the Agreement between the union and the carrier which provides as follows:

> "Rule 15. Yardmasters will be given 48 consecutive hours advance notice of reduction in force, with copy to General and Local Chairmen" (Appendix B, p. 32).

---

[1] Typical of these notices is the following:

Fort Worth, October 8, 1962

Mr. J. R. Joblin
General Yardmaster
Fort Worth, Texas

Effective with end of tour of duty Wednesday, October 10, 1962, General Yardmaster Position, Fort Worth, Texas, is abolished.

/s/ R. A. Rorie

With respect to the carrier's right to abolish or establish yardmaster positions, Rule 16 (e) of the Agreement provides as follows:

> "Rule 16 (e). This agreement shall not be construed as an obligation to maintain or establish yardmasters' positions, nor as restricting the Company's right to discontinue yardmaster positions now or hereafter established" (Appendix B, p. 32).

These notices, pursuant to Rule 15 of the Agreement, do not involve the abolishment of yardmaster positions at any terminal other than Forth Worth. On the basis of his analysis of and familiarity with operations at Fort Worth, the local superintendent determined that yardmaster supervision at that terminal was unnecessary (R. 42-46).

Upon receipt of the notices by the individual yardmasters involved, petitioner filed its complaint seeking an injunction restraining the respondent from abolishing yardmaster positions at Fort Worth and from "transferring the duties of such classification to other employees", on the grounds that such action by the railroad violated Section 2, First and Seventh and Section 6 of the Railway Labor Act (49 U.S.C., Sec. 152, 156).

The complaint referred to the existence of a collectively bargained agreement between the union and the carrier governing the rates of pay, rules and working conditions of yardmasters, although no reference was made to the provisions of that agreement which are quoted above and which specifically recognize and affirm the carrier's right to abolish yardmaster positions.

The complaint did not allege that any notices had been served by the carrier or the union requesting any change or notification of the rates of pay, rules or working conditions governing yardmasters as a class or craft employed by the carrier. However, the complaint alleged that the procedures of Section 6 of the Railway Labor Act relating

to changes in agreement must be followed before yardmaster positions could be abolished (Complaint paragraphs 10, 11 and 13, R. 10-12).

The carrier's answer to the complaint alleged that the action complained of was entirely proper under the terms of the existing agreement and did not contravene any of the provisions of the Railway Labor Act; that the union's claim was basically one involving the interpretation or application of the existing agreement between the parties; that such a claim is subject to the exclusive jurisdiction of the National Railroad Adjustment Board after proper handling under the grievance procedures of the agreement and that the union thus had an adequate remedy at law (R. 22-24).

With respect to the specific terms of the agreement, the carrier's answer set out Rules 15 and 16(e), providing for notice to yardmasters of job abolishments, and specifically stating that the "agreement shall not be construed . . . as restricting the company's right to discontinue yardmaster positions."

In connection with the jurisdiction of the National Railroad Adjustment Board, the carrier's answer cited several Awards of the Board involving claims presented by the union under the existing agreement between the parties, identical in all respects to the claim here involved (R. 25). It was alleged that these awards clearly recognize and establish the jurisdiction of the Board over claims indistinguishable from that described in the complaint.

At the trial before the District Court counsel for the carrier urged the court to consider the legal defenses raised in the answer in advance of a hearing on the merits. This suggestion was overruled (R. 32-33). Evidence was then introduced subject to the railroad's objection that it related to matters exclusively within the jurisdiction of the National Railroad Adjustment Board (R. 35).

Generally the evidence introduced by the union related to the manner in which switching operations are conducted at Fort Worth and the circumstances which make yardmaster supervision of such operations unnecessary at that terminal (R. 43-45, 52-53, 58-59, 160).

Much of the testimony introduced by the union involved detail as to the activities of yardmasters in general, and to some extent the specific activities of yardmasters at the Fort Worth terminal (R. 90-92, 134-156). Officers of the Union testified at some length on this subject (R. 89-118).

The testimony also showed that the union has presented many claims to the National Railroad Adjustment Board based on the abolishment of yardmaster positions on the Respondent Railroad and on other carriers on which it holds representation rights, and that the present suit is the first occasion on which the elimination of such positions has been challenged as a violation of the Railway Labor Act (R. 107-108, 114). Other evidence introduced by the union involved detailed description of the duties of engine foremen at the Fort Worth terminal, elicited from a witness who works most of the time as a yard helper rather than as engine foreman (R. 133). It also appears from this and other testimony that the yardmasters working at Fort Worth whose positions would be abolished by the notice in question hold seniority rights as engine foremen (R. 132-133). In the event of the abolishment of their positions, these employees would revert back to that status and would be working on the three shifts operated at Fort Worth as engine foremen, supervising the work of the switching crews (R. 132-133, 161).

During the course of the hearings, the various awards of the National Railroad Adjustment Board which have adjudicated claims by the Railroad Yardmasters of America against Respondent's parent Railroad Company arising from the elimination of yardmaster positions at other points on the lines of the carrier, were cited (R. 169-170).

These awards affirm the right of the carrier to eliminate such positions and also hold that the agreement "permits the yardmaster duties to be performed by certain classes of employes who are not yardmasters" (Award No. 967, National Railroad Adjustment Board (Fourth Division)).

In its Memorandum Opinion, the District Court stated the claim of the union to be "that the Railroad cannot take unilateral action designed to eliminate the yardmaster classification without having given notice under Section 6 of the Railway Labor Act and having exhausted the negotiation and mediation procedures under the Act" (R. 200). Since Section 6 governs the procedure to be followed in the event of "an intended change in agreements," the claim thus described clearly required a determination that the existing agreements prohibited the abolishment of yardmaster positions, as contemplated by the letter of October 8, and that a notice to change the agreement under Section 6 was required. The District Court then proceeded to interpret the agreement between the parties without any regard at all of the exclusive jurisdiction of the National Railroad Adjustment Board in the premises. The District Court held that "the bargaining agreement clearly contemplated that the work theretofore performed by yardmasters would continue to be done by them as long as it existed" (R. 223). It also held that the provisions of the agreement recognizing and affirming the carrier's right to "discontinue yardmaster positions now or hereafter established" did not permit "abolishing the classification of yardmaster" (R. 223). This characterization of the proposed action as "abolishing the classification of yardmaster" is apparently a reference to the fact that all of the yardmaster positions at Fort Worth (3 regular and 1 relief) would be abolished by the October 8, 1962, notices.

The Court thus proceeded to decide precisely the same questions of contract interpretation, involving the same agreement, as those determined by the Adjustment Board

in the Awards referred to above, with exactly opposite results.

The Court of Appeals after considering the basic facts of the dispute as set forth in the complaint and answer stated that the parties seemed to agree on the proposition that certain types of disputes arising between carriers and their employees may be of such a nature that the Railroad Adjustment Board has exclusive jurisdiction over them and that in such a case suit may not be filed in the courts until after the procedures provided for in the Railway Labor Act are complied with. Upon the basis of this court's holding in *Elgin, Joliet and Eastern Railway Company* v. *Burley*, 325 U.S. 711, the court concluded that this case was one of the class in which the jurisdiction of the Railroad Adjustment Board is exclusive.

The Court of Appeals held that the petitioner had fallen into the error of assuming that whenever an issue between a carrier and a union relates to rates of pay, rules or working conditions, Section 6 must be invoked and that the Trial Court seemed to have concluded that the effect of the conduct proposed by the carrier, even though authorized by the contract, was of such major significance that it had to be deemed a "major dispute". The Court of Appeals stated:

> "It is clear that in solving the problem presented to it, the trial court actually construed the language of Rule 16(e) as not authorizing the discontinuance of the yardmaster positions, thus clearly demonstrating that it was rejecting the carrier's *construction* of the contract of employment.
>
> . . . .
>
> "We do not, of course, any more than did we in the M-K-T case *supra*, attempt to construe the contract. This is to be done by the appropriate tribunal. We do say that a defense based upon the language of Rule 16(e) raises a substantial issue as to the interpretation of the contract. It is not a fictitious or merely color-

able issue. Before a trial can decide that the terminations at issue were not justified, it must construe the language of Rule 16(e)."

The Court of Appeals then concluded that the District Court erred in entertaining jurisdiction of this suit.

REASONS FOR DENYING THE WRIT

I.

The court below properly held that the issues here involved are within the exclusive jurisdiction of the National Railroad Adjustment Board

Under the Railway Labor Act, disputes which may arise either involve the formation of or changes in agreements concerning rates of pay, rules or working conditions, or the interpretation or application of such agreements (45 U.S.C., Sec. 152). With respect to the first category, known as major disputes, the procedures of negotiation, mediation, voluntary arbitration and emergency board consideration are provided by the Act. The second category, known as minor disputes, are subject to other provisions of the Act, including ultimate reference to the National Railroad Adjustment Board.

The distinction between the two types of disputes was discussed at length by this Court, in *Elgin, Joliet and Eastern Railway Company v. Burley*, 325 U.S. 711 (1945). The Court summarized the basic differences as follows:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore, *the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.*
>
> "*The second class, however, contemplates the existence of a collective agreement already concluded or, at*

> *any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.* The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.
>
> "In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world." (Pp. 723-24) (Emphasis added).

Clearly petitioner's "claim is to rights accrued," and the situation is one where no effort has been made to "bring about a formal change in terms" of the applicable agreement. The protests made have arisen "incidentally in the course of an employment," namely the employment of certain yardmasters. All the tests announced by this Court in *Burley* are typically met in this case.

The jurisdiction of the National Railroad Adjustment Board over the present dispute is established beyond question by the classic case in this field, *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, which involved issues virtually identical to those raised here. In that case, the carrier abolished positions held by road conductors, represented by the Order of Railway Conductors, and established yard conductor positions, represented by the Brotherhood of Railroad Trainmen, to operate five trains. The conductors claimed that this change could not be made unless the procedures of Section 6 of the Act were followed while the carrier contended that its existing agreements permitted the action complained of and that the procedures of Section 6, relating to intended changes in agreements were inapplicable. This Court held that these conflicting contentions clearly established that the dispute involved an inter-

pretation of the agreements upon which the carrier relied and was thus referable to the Adjustment Board, stating:

> ". . . the only conduct which would violate § 6 is a change of those working conditions which are 'embodied' in agreements. But the answers here specifically denied that the O. R. C. [Order of Railroad Conductors] agreements provided that road conductors operate the five trains in question. This put in issue the meaning of the contracts that allegedly embodied the working conditions which the trustees were about to change. The court, therefore, had to interpret these contracts before it could find that § 6 had been violated." (326 U.S. at p. 565).

In *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 188 F. Supp. 721 (1960), aff'd 307 F. 2d 21 (C. A. 2, 1962), cert. denied 372 U. S. 954, the District Court held that a dispute over changes in assigned runs resulting in the elimination of 10 positions was a minor dispute. In that case, as here, the claim of the union was that the carrier must first proceed under Section 6 of the Railway Labor Act. Numerous other courts of appeal have characterized similar disputes as minor disputes, referable to the National Railroad Adjustment Board. See *Hilbert* v. *Pennsylvania R. Co.*, 290 F. 2d 881 (C. A. 7, 1961); *Norfolk and P. B. L. R. Company* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (C. A. 4, 1957), cert. den. 355 U. S. 914 (1958) (dispute over change by carrier in reporting points of yard crews); *In re Hudson & Manhattain Railroad Company*, 172 F. Supp. 329 (1959), affirmed 267 F. 2d 941 (C. A. 2, 1959), cert. den. 363 U. S. 843 (1960) (dispute over the abolishment of trainmen's positions); *Louisville & Nashville Railroad Company* v. *Brown*, 252 F. 2d 149 C. A. 5, 1958; *International Assn. of Machinists* v. *Eastern Air Lines*, 320 F. 2d 451 (C. A. 5, 1963); and *Brotherhood of Locomotive Firemen* v. *Central of Georgia Ry.*, 199 F. 2d 384 (C. A. 5, 1952); cert. den. 345 U.S. 908 (1953). The disputes in all these cases are analogous to the present one which is also a minor dispute.

The inescapable fact that the present dispute is subject to the Adjustment Board's exclusive jurisdiction is also shown by the National Mediation Board's Report to Congress for the Fiscal Year ended June 30, 1962. That Board has been the agency charged with the administration of the Railway Labor Act for a period of almost thirty years. It is thus intimately familiar with the provisions of the statute and the judicial authority interpreting and construing it.

In this most recent report, the Board summarized this accumulation of experience and judicial construction of the Act with reference to the type of claim made by the union in the present case. It stated:

> "Applications for the mediation services of the Board frequently indicate a misunderstanding as to the jurisdiction of the National Mediation Board and that of the National Railroad Adjustment Board. *Such applications are received with the advice that a change made or proposed to be made by the carrier 'constitutes a unilateral change by the carrier in the working conditions of the employees without serving notice or conducting negotiations under section 6 of the Act.'* The Board is requested to take immediate jurisdiction of the dispute and call the carriers' attention to the 'status quo' provisions of section 6 of the Act, i. e., have the carrier withhold making the change in working conditions, or restore the preexisting conditions if the change has already been made, until the dispute has been processed by the National Mediation Board" (p. 27).

After quoting Section 6 of the Railway Labor Act, the Report of the Board continues:

> "The organization in these instances will contend that proposed changes by the carrier should not be made without following the procedures cited in section 6 above. *These changes may involve assignment of individual employees or crews in road passenger or freight service, relocation of the point for going on and off duty in yard service, reduction of the number*

of employees through consolidations of facilities and changes which arise from development of new and improved methods of work performance." (p. 27).

What the Board describes as the typical position of the organization is essentially the claim made by petitioner in this case, that changes of this kind cannot be made without following the procedures of Section 6 of the Act. Moreover, the changes described by the Board include "reduction of the number of employees" which is the situation here. The Board then discusses the position of the carrier in such cases as follows:

> "The carrier, on the other hand, will maintain *the procedure of notice and conference outlined in section 6 does not apply as the section has application only to those working conditions incorporated in written rules which have been made a part of the collective bargaining agreement with the representative of the employees and by which the carrier has expressly restricted or limited its authority to direct the manner in which certain services shall be rendered by its employees*" (p. 28).

This, in substance, is the position of the carrier in this case. The Board then concludes that such disputes are referable to the Adjustment Board:

> "It is clear then that disputes of this nature involve a problem as to whether the proposed change can be instituted without serving a notice of intended change in the agreement on the other party. *This raises a question of application of the existing agreement to the pending proposal. Such a dispute is referable to the National Railroad Adjustment Board.* On the other hand, if it is contended by the organization that the carrier has no right to make the proposed changes, and the carrier maintains that it is not restricted by the terms of the agreement from making the change, then the dispute pertains to the question of what the agreement requires and the dispute should be referred to the National Railroad Adjustment Board in accordance with section 3 of the Railway Labor Act for decision" (p. 28).

Thus the Board in its lengthy administration of the Act has interpreted it to require submission of disputes such as the one here involved to the National Railroad Adjustment Board.

The jurisdiction of the National Railroad Adjustment Board is also most clearly illustrated by the proceeding before that agency instituted by petitioner on other occasions. The union was the claimant in the proceedings before the Fourth Division of the National Railroad Adjustment Board which eventuated in the awards cited in the carrier's answer (R. 25). All of these claims presented to the Adjustment Board by the union were based on the abolishment of yardmaster positions and the claim that duties of yardmasters had been transferred to others. In all essential respects therefore the claims presented to the Adjustment Board by the union were the same as the claim incorporated in the present complaint.

All that the union has done in attempting to avoid the jurisdiction of the National Railroad Adjustment Board in the present case is to add the conclusion of law that the proposed action of the carrier in abolishing the yardmaster jobs at Fort Worth is a violation of Section 2, Seventh and Section 6 of the Railway Labor Act. In other words, the union in the present case presented a claim to the District Court which contained all of the constituent elements of the claims which it had previously presented to the National Railroad Adjustment Board, but attempted to evade the jurisdiction of that Board by characterizing the proposed carrier action as a violation of the Railway Labor Act. This characterization by the union, however, does not establish that fact. This is particularly obvious when the terms of Section 2, Seventh and Section 6 of the Act, which are allegedly violated here, are considered. As previously stated, those Sections of the Act govern the procedures to be followed when one of the parties to an existing agreement proposes to change the

terms of the agreement, applicable to its employees as a class. In order to determine that those Sections apply to the action involved here, it is thus necessary to examine the contractual relationship between the parties and to determine whether the carrier has the right to proceed under the agreement, as is claimed in the answer which has been filed. This analysis demonstrates that petitioner's effort to change labels cannot succeed. The Adjustment Board awards referred to illustrate that there are substantial and fundamental questions of contract interpretation involved in the kind of claim presented by the union to the District Court. It is not the label which petitioner chooses to attach but the essential nature of the dispute as illustrated by these awards and the authorities which have been cited, which govern its classification as a major or a minor dispute.

Just over a year ago this Court emphatically reiterated its holdings that the jurisdiction of the Adjustment Board in cases such as this is exclusive, saying:

> "The several decisions of this Court interpreting § 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes. The right of one party to place the disputed issue before the Adjustment Board with or without the consent of the other, has been firmly established. *Brotherhood of R. R. Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. at 34, 77 S. Ct., at 637. And the other party may not defeat this right by resorting to some other forum." *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville R. Co.*, 373 U.S. 33, 38.

II.

The petition fails to state any cognizable ground for granting the writ

Petitioner vainly tries to create the impression that this Court's decision in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, justifies the writ, but the plain fact is that *Pitney* clearly requires that the writ be denied. Although petitioner attempts to distinguish *Pitney* and set itself apart from the effect of that decision, it cannot escape the clear meaning of that case.

The Court below properly held that the District Court had no jurisdiction to construe a labor agreement or to decide the issue involving the interpretation of that agreement. The Railway Labor Act clearly prescribes the procedure to be followed and, as indicated above, this Court has clearly held time and again that those procedures *must* be followed.

The interpretation and construction of a provision in a labor agreement is delegated solely and exclusively to the Railroad Adjustment Board by the provisions of Section 3 of the Act. It is apparent that the Court below properly applied those provisions and it is equally apparent that petitioner would distort them. It is in this same context that petitioner significantly misconstrues the decision of this Court in *Pitney* (*supra*).

It is a basic and established proposition that the benefits to be derived, upheld, and enforced under a railroad labor agreement involve a two-step procedure. When the interpretation and construction of an agreement is involved, that facet of the case is delegated solely and exclusively to the Railroad Adjustment Board. It is only if that body in its expertise construes that there is in fact a right subject to enforcement that the minimum residual of jurisdiction in the judiciary can be brought into play. That is the second step in the procedure which petitioner misconstrues.

The Court below was dealing with the first step in the procedure when it properly held that a court lacks jurisdiction to construe a labor agreement. The *Pitney* case cited by petitioner (Petition, pp. 11, 19, 20) discussed both the first and the second step of the procedure involved. The term "equitable discretion" relied upon so heavily by petitioner must of necessity be read in context and in conjunction with the language before and following that term. When dealing with the first step of the procedure, this Court said in *Pitney:*

> "*Only after the Adjustment Board acts, but* not until *then*, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O.R.C. *can not show* irreparable loss and inadequacy of the legal remedy." (Emphasis supplied) l.c. 326 U.S. 567.

Regardless of the faulty reasoning applied by petitioner, the end result in the *Pitney* case is the same result reached by the Court below in this case.

Petitioner is relegated to proceeding before the Railroad Adjustment Board which has the exclusive jurisdiction to decide whether or not the individual employees involved have a right subject to enforcement. If that administrative body decides there is a right in existence, then and only then may a court enforce that right (45 U.S.C.A. § 153(p)). Petitioner here has consistently misconstrued the provisions of the Railway Labor Act enacted on the subject and regardless of the misconstruction and citation out of context of certain passages of the *Pitney* case, it cannot bring itself within any benefits it assumes to be granted there.

The law as it applies to this situation has been enunciated by this Court time and again to the point where it should be ingrained in the minds of all dealing with the Railway Labor Act.

In *B. & O. R. Co.* v. *United Railroad Workers*, 271 F. 2d. 87 (C.A. 2, 1959), the Second Circuit Court aptly described the function of a court in situations such as this case presents, saying:

> "Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute" (271 F. 2d 87 at p. 91).

This position has been firmly established and recognized by this Court in *P. R. R.* v. *Ruehlik et al*, 352 U.S. 480 (1957); *Pennsylvania R. R. Co.* v. *Day*, 360 U.S. 548 (1959); *Slocum* v. *Del., Lackawanna and Western R. Co.*, 339 U.S. 239 (1950); *State of Calif.* v. *Taylor*, 353 U.S. 553 (1957).

It is apparent that petitioner was mistaken in its search for a remedy when it sought the aid of the district court because a court has no jurisdiction in the premises at this stage of the procedure.

In a rather drastic attempt to establish that there has been some overriding wrong done by the Court of Appeals, petitioner tries to leave the impression that the railroad in some ways failed to meet its duty to bargain under the Railway Labor Act. (Petition, pp. 12-13). What the statute requires in this respect, however, depends on a determination as to whether the dispute in question is a major or minor dispute. What the petitioner seeks is not an opportunity to confer in the manner provided for the settlement of disputes over the interpretation or application of agreements, instead it seeks a determination that the procedures applicable to major disputes must be exhausted by the carrier prior to the abolishment of yardmaster positions at Fort Worth. Appropriate opportunity to confer is available to the union, if and when it desires conferences, under the provisions of the statute and the existing agreement, which govern the handling of disputes involving the interpretation or application of agreements.

Section 2, First, of the Railway Labor Act (45 U. S. C. A., Section 152, First) imposes the obligation on employees and employers to make every effort to settle all disputes, including those arising out of the application or interpretation of existing collective agreements. This section is a preliminary statement of the purpose and policy of the provisions of the Railway Labor Act which follow: In *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 320 U. S. 323 (1943), this Court stated:

> "Nor does § 2, Second make justiciable what otherwise is not. . . . But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands." (p. 334).

With respect to disputes over the interpretation or application of existing agreements, these "particularized commands" first appear in Section 2, Sixth, which provides as follows:

> "Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) that the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties" (45 U. S. C. § 152, Sixth).

Under the agreement now in effect between the carrier and the union, Rules 11 and 12 prescribe in detail the handling of disputes growing out of the interpretation or application of existing collective bargaining agreements (Appendix B, hereto). Such procedures are sanctioned by the second proviso of Section 2, Sixth. A claim must first be presented in writing to the appropriate carrier officer. In the present case no such claim has been presented and thus the occasion for conference has not arisen. Furthermore, there has been no request for conference under the provisions of Section 2 Sixth (Appendix A hereto).

Such conferences and the related procedures which are appropriate to the handling of disputes involving interpretation or application of agreements do not, of course, impose any obligation on the carrier to refrain from pursuing the action with respect to which the claim is made. As the Court pointed out in *Baltimore & Ohio R. R. Co. v. United Railroad Workers*, 271 F. 2d 87 (C.A. 2, 1959), which involved the abolishment of all firemen positions (the entire firemen classification) on diesel tug boats:

> "Until management announced its decision, the unions had no grievance and *nowhere in the Act is to be found any intimation that management must consult with union representatives before taking such action*" (p. 90).

The conferences and negotiations which are appropriate in a dispute over the interpretation or application of an existing agreement are contemporaneous with the handling of a specific claim under the procedures of the governing agreement and the Railway Labor Act. There is no obligation upon the carrier to confer and consult with the organization prior to taking the action with which the organization disagrees.

It is clear, however, that the negotiations to which petitioner refers are not negotiations of the kind appropriate to the handling of disputes over the interpretation or

application of an existing agreement. Petitioner instead seeks to require the carrier to pursue all of the procedures of the Railway Labor Act appropriate to the handling of so-called "major disputes." If petitioner is correct, the carrier cannot exercise its right under the agreement to abolish yardmaster positions unless the following steps have been taken: a 30-day notice must be given under Section 6 of the Railway Labor Act and a time and place must be fixed for conferences. After these and subsequent conferences have been held either party to the dispute may invoke the services of the National Mediation Board under Section 5 of the Act.[1] Representatives of the Board will then intervene and mediation conferences will ensue. If mediation by the Board proves unsuccessful it may then proffer arbitration. If either party to the dispute declines arbitration, the Board is authorized to close its files, retaining, however, the authority under Section 10 of the Act to recommend to the President of the United States that an Emergency Board be created to investigate and report with respect to the dispute.

The creation of such a Board, pursuant to the recommendations of the National Mediation Board, ordinarily results in hearings and other efforts by the Board to develop the facts with respect to the dispute. Within 30 days after its appointment, unless the time is extended by stipulation of the parties, the Emergency Board is required to submit its recommendations and report to the President of the United States. After the Board's report

[1] In this connection, it should be noted that the National Mediation Board has interpreted the Act to require submission of disputes such as the present one to the National Railroad Adjustment Board. Application for mediation in such disputes, according to the National Mediation Board, "indicate a misunderstanding as to the jurisdiction of the National Mediation Board and that of the National Railroad Adjustment Board" (National Mediation Board's Report to Congress for the Fiscal year ended June 30, 1962, pp. 27-28). See pp. 13-15, *supra*.

is issued, the parties are required to confer and negotiate for the purpose of attempting to dispose of the dispute on the basis of the recommendations made by the Board. If these negotiations are unsuccessful either party may resort to so-called "self-help" after the expiration of 30 days from the time of the Board's report. During this entire period, which ordinarily requires many months, and sometimes requires several years, the carrier is required to maintain the status quo in accordance with the provisions of Section 6 and Section 10 of the Railway Labor Act. Furthermore, at the end of these time-consuming procedures the organization is free to strike to prevent the carrier from effectuating the change which is the subject of the dispute. Thus, when petitioner asserts that it wishes only an opportunity to sit down and negotiate with the carrier, it is in reality asking the Court to require adherence to the procedure just described and to prohibit the carrier from taking any action during the time required to exhaust these procedures.

From the foregoing it is obvious that once the determination is made that a dispute under the Railway Labor Act is either a major or a minor dispute, the bargaining processes are clearly spelled out. In this respect the Railway Labor Act differs from some other labor statutes. For this reason we suggest that petitioner's reliance upon the granting of a writ in *Fiberboard Paper Products Corporation* v. *NLRB*, 322 F.2d 411 (C.A.D.C. 1963) certiorari granted, 375 U.S. 963, (Petition, pp. 13-14) is misplaced. Regardless of the problems which may exist under other statutes in this respect, the requirements of the Railway Labor Act are well defined and precise and the granting of the writ for the purpose of resolving the difficulties exemplified by the so-called *Fiberboard* case does not in any way support the claim that a writ should be granted in this matter.

Petitioner implies that the decision of the Court below has substantially changed pre-existing rights and obligations under the Railway Labor Act, stating:

> "This adverse effect of the decision has already been felt, however, for on April 15, 1964, the Fifth Circuit rendered a decision in *Aaxico Airlines, Inc.* v. *Air Line Pilots Association* (No. 20931) · F. 2d [55 LRRM 2982, 49 CCH LC ¶18,886], on the authority of its opinion in the instant case, . . ." (Petition, p. 21)

An examination of the *Aaxico* case, however, reveals that petitioner greatly over emphasizes the court's reliance on the *Yardmasters* case. The only citation of the *Yardmasters* case in the Aaxico opinion is:

> "The answer to this question is found in determining whether the dispute is what has generally been recognized in cases arising between carriers and their employees as a 'minor' dispute or a 'major' dispute. This terminology, used by the Supreme Court in *Elgin, Joliet & Eastern Rwy. Co.* v. *Burley*, 325 U.S. 711, was discussed by us in a recently decided case, *St. Louis, San Francisco & Texas Rwy. Co.* v. *Railroad Yardmasters of America, AFL-CIO*, 5th Cir. . . . . F. 2d . . . . , No. 20570, decided March 4, 1964. Pointing out, as we did, in that opinion that the court has adhered to the distinction between minor disputes and major disputes we there said, 'It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedure set forth in the contract.'
>
> "We thus recognized what has always been the distinction between the two types of disputes. If 'the dispute relates either to the meaning or proper application of a particular provision [of an existing agreement] with reference to a specific situation or to an omitted case,' *Elgin, Joliet & Eastern Rwy. Co.* v. *Burley*, 325 U.S. 711, it is a minor dispute no matter

how seriously it may affect the parties to the contract." (Appendix C, p. 41; *infra*)

Obviously the Court of Appeals did not consider that it was establishing any new rule by its decision in this case, but rather it was following the well established principles announced in *Burley, supra*. We note in passing that this is not the first time that petitioner has tried to use the *Aaxico* case to delay decision in this case. Beginning in the District Court similar requests for delay have been based upon the existence of that case.

We respectfully submit that petitioner has wholly failed to establish that a writ should be granted.

III.

This Court has consistently denied certiorari in cases where similar issues have been presented

Petitioner seeks to have this Court review principles so firmly established that certiorari has been denied to other petitioners time and again when the issues have been identical to the issues now presented. Some of the recent cases are:

In 1963, certiorari was denied in *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers*, 188 F. Supp. 721 (1960), aff'd 307 F. 2d 21 (C. A. 2, 1962), *cert. den.* 372 U.S. 954. There the District Court held that a dispute over changes in assigned runs resulting in the elimination of 10 positions was a minor dispute. In that case, as here, the claim of the union was that the carrier must first proceed under Section 6 of the Railway Labor Act.

In 1961, certiorari was denied in the case of *Hilbert v. Pennsylvania R. Co.*, 290 F. 2d 881 (C. A. 7, 1961), *cert. den.* 368 U.S. 900. There again the carrier claimed authority under the labor agreement to take action to transfer

crews, and the union claimed that the carrier had no such authority under the agreement.

In 1960, certiorari was denied in *In re Hudson & Manhattan Railroad Company*, 172 F. Supp. 329 (1959), aff'd 267 F. 2d 941 (C. A. 2, 1959), *cert. den.* 363 U.S. 843. That case involved a dispute between the railroad and the union concerning the right of the railroad to promulgate new work schedules which would eliminate 17 jobs. There also the railroad pointed to its labor agreement as authority for the proposed action and the union denied that the agreement gave such right.

In 1958, certiorari was denied in *Norfolk and P.B.L.R. Company* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (C. A. 4, 1957), *cert. den.* 355 U.S. 914. That case involved an issue between the railroad and the union concerning the right of the railroad to establish a new point for reporting and relief. The relative rights of the parties there could be determined only by an interpretation of the labor agreement.

Only last Monday, May 25, 1964, this Court denied certiorari in another such case, *King* v. *Atlantic Coast Line R.R. Co.*, 323 F. 2d 1005 (C. A. 5, 1963), No. 904 this Term. That case was a suit brought by railroad employees claiming that the railroad had unlawfully abolished their jobs and wrongfully assigned similar work to others. The Court of Appeals held that the District Court was correct in dismissing the case because it involved interpretation of the collective bargaining agreement and hence was within the exclusive jurisdiction of the National Railroad Adjustment Board.

Respondent here respectfully submits that the factual situation involved in the case presented by petitioner is indistinguishable from the foregoing cases in that the right of the carrier to take the action it proposed to take was based upon the labor agreement and the determination of the issues could be made only after interpreting that agreement. This presents a classic minor dispute.

CONCLUSION

We urge that by no standard is this case worthy of review by this Court. Not only is the decision below correct, but it is also evident that the Court of Appeals applied settled principles to a fact situation similar to facts considered by this Court many times. This case involves no new principles and petitioner does not even contend that the decision conflicts with any other Court of Appeals decision.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS

In addition to the portions of the Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.) reproduced in Appendix A to the petition the following portion of that Act is pertinent.

"TITLE I

"Section 2.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

APPENDIX B

Excerpts from Agreement Between St. Louis-San Francisco Railway Company, St. Louis, San Francisco and Texas Railway Company and Railroad Yardmasters of America, which was attached to the Answer as Exhibit A (R. 27) and which was also Plaintiff's Exhibit 8A (R. 252).

Effective September 16, 1945.

Revised Effective February 1, 1957.

Except Where Otherwise Indicated.

Scope

Rule 1. (a) These rules shall govern the hours of service, working conditions and rates of pay of Yardmasters. The term "Yardmaster" as used in this agreement shall be understood to mean Yardmasters of all grades except as otherwise provided herein.

(b) One position of general yardmaster at each of the following terminals does not come under the scope of this agreement: St. Louis, Springfield, Monett, Tulsa, Oklahoma City, Kansas City, Memphis and Birmingham. The rules of this agreement do not apply to these positions. It is understood and agreed there shall be no restriction upon the company as to yardmaster or other duties which may be required of or performed by general yardmasters filling positions listed in this rule.

(c) This agreement does not change present practice of officers of the railway, agent yardmasters or footboard yardmasters directing or supervising switching or yard service.

Rule 11.

(b) A yardmaster having a claim or grievance arising out of the interpretation and application of these rules, or who considers himself unjustly treated in matters other than discipline, will, or his representative may in his behalf, present such claim or grievance in writing to the supervising officer. Should such a yardmaster not be satisfied with decision rendered, he or his representative may appeal the case up to and including the highest officer designated by the Management to handle such matters.

(c) The provisions of Rule 12 will govern in the presentation and handling of claims and grievances under this rule.

Time Limit on Claims and Grievances.

Rule 12. All claims or grievances arising on and after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 calendar days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 calendar days from the date same is filed, notify the employe or his representative of the reasons for such disallowance. If not so notified, the claim or grievance shall be considered valid and settled accordingly but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be taken within 60 calendar days from receipt of notice of disallowance and the representative of the Carrier shall be notified within that time of the rejection of his decision. Failing to com-

ply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60 calendar day period for either a decision or appeal, up to and including the chief officer of the Carrier designated for that purpose.

(c) The procedure outlined in paragraphs (a) and (b) pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer except in cases of appeal from the decision of the highest operating officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest officer shall be barred unless within 6 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 6 months' period herein referred to.

(d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 calendar days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service

in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(e) This rule recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievances for and on behalf of the employes they represent.

(f) This rule shall not apply to requests for leniency.

* * * *

Notice of Positions Discontinued.

Rule 15. Yardmasters will be given 48 consecutive hours advance notice of reduction in force, with copy to General and Local Chairmen.

* * * *

Rule 16. (e) This agreement shall not be construed as an obligation to maintain or establish yardmasters' positions, nor as restricting the Company's right to discontinue yardmaster positions now or hereafter established.

The following is a Memorandum of Understanding between the Carrier and the Union introduced as Defendant's Exhibit 1 (R. 298)

MEMORANDUM OF UNDERSTANDING.

Confirming verbal understanding reached in conference at St. Louis, Missouri today, it is understood paragraph (e) of Rule 1, agreement effective September 11, 1945, which reads:

> "This agreement does not change present practice of officers of the Railway, agent-yardmasters or footboard yardmasters, directing or supervising switching or yard service."

applies to instances where officers of the Railway, agent-yardmasters or footboard yardmasters are required to

perform certain yardmaster duties after the effective date of the agreement signed at St. Louis September 11, 1945 and effective September 16, 1945, as well as instances where this was being done at the time the agreement was signed.

Signed at St. Louis, Mo., April 18, 1946.

For FRANK A. THOMPSON,
Trustee

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Debtor

By C. P. KING
Assistant Chief Operating Officer

For ST. LOUIS, SAN FRANCISCO AND TEXAS RY. CO.

By C. P. KING
Assistant to Vice President

For RAILROAD YARDMASTERS OF AMERICA

By L. J. SMITH
General Chairman

W. F. MITCHELL
Secretary, General Committee

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20931

AAXICO AIRLINES, INC., *Appellant*,

v.

AIR LINES PILOTS ASSOCIATION, INTERNATIONAL, ET AL., *Appellees*.

Appeal from the United States District Court for the Western District of Texas.

(April 15, 1964.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This appeal raises the question whether the trial court had jurisdiction to construe what it found to be a subsisting agreement and to grant an injunction requiring the appellant to carry out the terms of such agreement as construed by the trial court.

The contest between the parties arose in the following manner:

Aaxico had for several years conducted an air transportation business with the use of C-46 aircraft on the basis of contracts with the United States Government. Beginning on June 16, 1956, Aaxico and ALPA had been parties to a collective bargaining agreement covering the employees flying its aircraft. The most recent of the collective bargaining agreements between the parties became effective on January 1, 1960. It provided that it was to continue in full force and effect until June 30, 1963, "and thereafter until each succeeding June 30, unless written notice of intended change is served in accordance with Section 6, Title I of the Railway

Labor Act by either party thereto at least 60 days prior to June 30, 1961, or June 30 of any succeeding year."[1] Prior to the expiration date of this last agreement, and without any specific written notice "of an intended change in agreements affecting rates of pay, rules or working conditions," on the occasion of Aaxico's losing its Logair (Government) contract as of June 30, 1960, and the leasing by it of approximately 25 C-46 aircraft to Capitol Airways, which company acquired the Logair contract from the Government, Aaxico furloughed all of its approximately 221 pilot employees by giving them two weeks' notice as required under the agreement. The notice contained the statement, "We cannot, at this time, see any possibility of a resumption of our Logair flying but if any change should take place you will be promptly notified."

Thereafter, although Aaxico had no other air transportation business to carry on until it was able to obtain further or new contracts, it did not dissolve but maintained a skeleton organization principally engaged in seeking new contracts including an effort to bid on the following year's Logair contract.

On October 17, 1960, during the stated life of the contract, Aaxico wrote to ALPA as follows:

> "Aaxico Airlines has suspended service in all forms of air transportation. We operated our last flights in early July of 1960 and have not had any pilots in our employ since that date.
>
> "On December 7, 1959 an Agreement and various Letters of Agreement and a Supplemental Agreement were signed between Aaxico Airlines, Inc. and The

[1] Section 6, Title I of the Railway Labor Act is a provision relating to the change "in agreements affecting rates of pay, rules or working conditions," and provides for the processing of bargaining through the Mediation Board before proposed changes in such existing agreements can be put into effect.

Air Line Pilots in the service of Aaxico Airlines, Inc. as represented by The Air Line Pilots Association International.

"This letter is to advise that the subject matter of the agreements listed in the Paragraph above no longer exists and therefore Aaxico Airlines considers these agreements terminated and of no further legal force and effect.".

Appellee replied on November 8, in part, as follows.

"We are not in a position to agree entirely with your statement. So long as AAXICO remains inoperative, this document lies dormant. In the event that operations of the Company are resumed, however, within the period in which AAXICO pilot employees have job tenure under this Agreement, this Association would require their reemployment by the Company."

This letter from Aaxico and the reply by ALPA had clearly created the first dispute between the parties. If this dispute was referable to a construction of the terms of the then existing contract, the procedure required by the Railway Labor Act was that the aggrieved party should have then filed a grievance and processed it through the System Board of Adjustment. If, on the other hand, this amounted to the thirty days' written notice contemplated by Section 6 of Title I of the Railway Labor Act of "an intended change in agreements affecting rates of pay, rules or working conditions," the parties were under obligation to arrange for the conference provided for in Section 6 of Title I and proceed through the Mediation Board until the negotiations for the new contract or the change in the old contract, were exhausted.

Neither of these procedures was followed. Instead, after Aaxico obtained new Government contracts, effective July 1, 1961, in the performance of which it used

DC-6A aircraft, a type of aircraft different from that which had theretofore been used in the prior operation and as to which pilot qualifications are different and more stringent, the Airline proceeded to obtain pilots through two pilot supply companies which, for the purpose of this appeal, we can assume amounted to nothing more or less than a service agent for the employment of pilots by the Airline itself. However, prior to the actual commencement of operation, on June 28, 1961, appellee, without having made any further demand or request for arbitration or mediation under either provision of the Railway Labor Act, brought suit in the Florida State Courts against the appellant seeking a construction of the contract, a declaration of the rights, and enforcement of the contract.[2]

The next step chronologically was that on July 20, 1961, after appellant had begun DC-6A operations, appellee addressed a letter containing the following to the President of Aaxico:

> "Pursuant to the Agreement between Aaxico Airlines, Incorporated and the air line pilots in its service, as represented by the Air Line Pilots Association, International, the pilots of Aaxico Airlines, Inc., hereby file this as a Group Grievance and request an investigation and hearing thereon. The grievance is based upon the Company's violation of the Agreement, specifically including Sections 13 and 24 thereof, by refusing to recall furloughed pilots."

Section 13 of the contract provides for seniority. Section 24 provides for the demotions and reduction of personnel.

[2] This suit was subsequently dismissed, but not until after this present action was brought in the federal court and appellant moved to stay this action pending a decision of the Florida State Court.

The President of the appellant replied on July 27th as follows:

> "Air Line Pilots Association International was advised on October 17, 1960, Aaxico Airlines considers that the agreement previously existing between Aaxico Airlines and the airline pilots in the service of Aaxico has been terminated. This company, therefore, could not possibly be in violation of such terminated agreement and your request for a hearing based upon an alleged group grievance is entirely out of line and, of course, cannot be considered by this company."

To this letter appellee replied on August 4th:

> "I am in receipt of your letter of July 27, 1961 denying my request for a hearing relative to a group grievance dated July 20, 1961. Since this decision is unsatisfactory to the affected pilots, I hereby request an appeal hearing.
>
> "It is requested that the Company send a copy of all hearing notices and decisions rendered in this case to the undersigned and to the Legal Department, Air Line Pilots Association, International, 55th Street and Cicero Avenue, Chicago 38, Illinois."

No action thereafter having been taken by either party relating to the matter of grievance, ALPA filed this suit on August 24, 1961.

The pleadings and proof adduced before the trial court presented the following issues:

> (1) Did the loss by Aaxico of its sole air carriage contract, followed by the leasing of its planes to another airline and the furloughing of all of its pilots, and the complete suspension of its operations pending the obtaining of a new contract, either constitute a termination of the collective bargaining agreement

then in effect or did it warrant Aaxico in treating it as terminated by its unilateral action?

(2) What tribunal is appropriate under the National Railway Labor Act to decide issue No. 1?

(3) If the agreement between Aaxico and ALPA remained in effect through the date of expiration, June 30, 1961, notwithstanding the circumstances mentioned in issue No. 1, were any of the rights of ALPA and its members under such agreement violated upon the occasion of Aaxico's reengaging in air carriage under the contracts it obtained to be effective July 1, 1961?

(4) If such rights were violated, what tribunal should make these determinations?

(5) Did the district court have jurisdiction over this controversy and, if so, to what extent?

The trial court held that the first issue was to be answered in the negative. It decided on the basis of the facts, which were undisputed so far as actually bear on *this* issue, that the loss of the Logair contract with the Government by Aaxico and its complete suspension of operations pending the negotiation of a future contract, which occurred approximately one year later, neither amounted to a termination nor did it justify Aaxico in terminating it unilaterally.

Thus, the trial court also answered the second issue. It decided that it was the proper tribunal to pass on this legal question.

The trial court also answered issue No. 3 by stating that it had jurisdiction to determine that under the contract there were certain rights both of ALPA and of its members that were violated when Aaxico hired new pilots, and paid them different rates of pay than provided for under the agreement and when it hired the new pilots

without reference to the seniority and other provisions of the existing agreement.

The court, thus, also decided issue No. 4, partially, to the effect that it was the proper tribunal to determine what rights under the contract had been violated, but it also decided that there were certain other contract disputes that should be referred, following grievance procedures as outlined in the agreement, to the System Board of Adjustment.

Finally, the court answered issue No. 5, both by the action it took in resolving issues Nos. 1 and 3, but also by concluding that it had the power to require Aaxico to assure the setting up of a System Board of Adjustment in order that grievance procedures could be pursued as provided for under the Railway Labor Act.

We conclude that the jurisdiction of the court was considerably more limited than that which it exercised. To the extent that the trial court could find on the record before it that the appellant had failed to make available the grievance machinery in order to permit a reference to a System Board of Adjustment, and to the extent that the court could find that ALPA had not either acquiesced in or abandoned any rights which it may have had under the contract, if not terminated, it would be within the competence of the trial court to have required Aaxico to assure the availability of grievance procedures and a System Board of Adjustment. In point of fact, Aaxico did not appeal from that part of the trial court's order which required it to "join with plaintiff Air Line Pilots Association in establishing a System Board of Adjustment to function under said contract; and give effect to such Sytem Board, as set out in the System Board Agreement of said contract."

This is another one of those cases which, when brought to court, poses the preliminary question whether the relief sought is relief which can appropriately be granted

by the court or which, under the carefully considered scheme of the Railway Labor Act, must be resolved by the System Board of Adjustment. The answer to this question is found in determining whether the dispute is what has generally been recognized in cases arising between carriers and their employees as a "minor" dispute or a "major" dispute. This terminology, used by the Supreme Court in *Elgin, Joliet & Eastern Rwy. Co.* v. *Burley*, 325 U.S. 711, was discussed by us in a recently decided case, *St. Louis, San Francisco & Texas Rwy. Co.* v. *Railroad Yardmasters of America, AFL-CIO*, 5th Cir. ..... F. 2d ....., No. 20570, decided March 4, 1964. Pointing out, as we did, in that opinion that the court has adhered to the distinction between minor disputes and major disputes we there said, "It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedure set forth in the contract."

We thus recognized what has always been the distinction between the two types of disputes. If "the dispute relates either to the meaning or proper application of a particular provision [of an existing agreement] with reference to a specific situation or to an omitted case," *Elgin, Joliet & Eastern Rwy. Co.* v. *Burley*, 325 U.S. 711, it is a minor dispute no matter how seriously it may affect the parties to the contract.

With these general principles in mind we look first to the first issue stated above. Clearly, the complaint by which this litigation was started was based on the theory that the agreement between Aaxico and ALPA was a continuing one and was still in effect. The complaint showed that the appellant had proceeded on the theory that the contract had been terminated. How, then, was this question to be decided? Obviously, it could be decided only by inter-

preting the agreement itself and thus it was a minor dispute; one which under the completely uniform holdings of the courts must be submitted to the grievance procedures with final decision to be made by the System Board of Adjustment. We conclude, therefore, that it was beyond the competence of the trial court to resolve this dispute.

So, too, with respect to the other interpretations made by the trial court of the obligations of the parties under the terms of the agreement. For instance, whether, assuming the contract was still in effect, Aaxico was required to recall for the operation of the new equipment requiring greater or different skills, the pilots who had previously been furloughed, was necessarily to be determined from the contract of employment. The failure of Aaxico to recall the pilots and, in their place, to accept pilots furnished by another agency, if objected to by ALPA or any of the plaintiffs, was the proper subject of grievance procedures in the traditional sense. Thus, it was beyond the competence of the trial court to resolve these issues as well, of course, as the issue of whether the pay requirements under the contract were to be carried out.

We think it clear that if the proof shows that Aaxico made impossible the carrying out by the appellees of the grievance procedures to the System Board of Adjustment, the trial court had jurisdiction to order Aaxico to carry out its obligations under the contract to make arbitration and decision of these matters effective. *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515.

The undisputed facts present in this case probably warrant a comment that, regardless of how the trial court finally determines the factual issues, a normal processing of the disputes immediately after they arose would have proved the efficacy of the plan contemplated in the Railway Labor Act, whereas the failure to resolve these disputes promptly has resulted in litigation that will inevitably

lead to serious unanticipated loss to one party or the other. This is true because if the question of the termination of the contract had been resolved in the fall of 1960 at a time when no pilots were employed or sought to be employed by Aaxico, this whole dispute might well have been resolved before the commencement of the operations by the use of new equipment July 1, 1961. We do not intimate a judgment on the issue whether the circumstances existing after the exchange of correspondence at that time amounted to either an acquiescence by appellees or a waiver of a right to pursue the dispute further, but we do hold that the extent of the rights of the appellees thereafter was to present their contention to the district court that they were unable to pursue their grievance procedures because of stated failures on the part of the appellant to make such processes available. Thereupon the trial court could promptly have resolved this issue either by directing submission of the questions to the grievance procedures or by holding that the appellees no longer had such rights.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.